

(A)
No. 97-122-ATX
Status: DECIDED

Title: City of Monroe, et al., Appellants
v.
United States

Docketed:
July 18, 1997

Court: United States District Court
for the Middle District of Georgia

Counsel for appellant: Daniel, Michael Christopher

Counsel for appellee: Solicitor General

12 copies of sealed exhibits filed 7-18-97, given to
Gary Kemp on 7-21-97.

Entry	Date	Note	Proceedings and Orders
3	Jul 17 1997	C	Application (A97-61) for a stay of permanent injunction entered by three judge panel, submitted to Justice Kennedy.
1	Jul 18 1997	G	Statement as to jurisdiction filed. (Response due August 17, 1997)
2	Jul 18 1997	D	Motion of appellant to seal exhibits filed.
4	Jul 22 1997		Response to application (A97-61) from United States requested by Justice Kennedy, due July 28, 1997.
5	Jul 28 1997		Response to application (A97-61) filed by United States.
6	Jul 31 1997		Response to Motion to seal exhibit requested from the United States, Due at noon on August 6, 1997
8	Jul 31 1997		Application (A97-61) referred to the Court by Justice Kennedy.
7	Aug 6 1997		Motion of appellant to seal exhibits DENIED.
9	Aug 6 1997		Application (A97-61) granted by the Court. The application for a stay of the permanent injunction entered by the three judge panel of the USDC for the Middle District of Georgia, case No. 94-CV-45(WDO) on April 21, 1997, presented to Justice Kennedy and by him referred to the Court is granted pending action by this Court on the statement as to jurisdiction. Should the appeal be dismissed or the judgment affirmed, this order shall terminate automatically. If probable jurisdiction is noted or postponed, this order shall continue in effect pending the sending down of the judgment of this Court.
10	Aug 18 1997		Motion of appellee United States to affirm filed.
11	Sep 3 1997		DISTRIBUTED. September 29, 1997 (Page 122)
13	Oct 6 1997		REDISTRIBUTED. October 10, 1997 (Page 25)
15	Oct 14 1997		REDISTRIBUTED. October 17, 1997 (Page 14)
17	Oct 27 1997		REDISTRIBUTED. October 31, 1997 (Page 22)
19	Nov 3 1997		REDISTRIBUTED. November 7, 1997 (Page 17)
21	Nov 10 1997		REDISTRIBUTED. November 14, 1997 (Page 13)
22	Nov 17 1997		Judgment REVERSED. Opinion per curiam. (Detached opinion.) Justice Souter and Justice Breyer dissent.

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No. _____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of
the City of Monroe; MONROE CITY COUNCIL; RANDY
PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J.
ENSLIN, ROSEMARY B. MATHEWS, and LARRY WAYNE
ADCOCK, Members of the Monroe City Council; SARA
CAMPBELL, City Clerk,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia
Athens Division

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether preclearance occurs under Section 5 of the Voting Rights Act where the Attorney General receives actual notice of an unprecleared voting practice and conducts a prompt, in-depth analysis of that voting practice then affirmatively decides to neither interpose a Section 5 objection nor request a Section 5 submission.

II. Whether the Attorney General may be legally or equitably barred from pursuing a remedy under Section 5 of the Voting Rights Act where the Attorney General has actual notice of an unprecleared voting practice and conducts an in-depth analysis of that voting practice yet fails to pursue a Section 5 remedy for eighteen years.

III. Whether the Attorney General may utilize Section 5 of the Voting Rights Act to achieve a Section 2 remedy where there is an absence of evidence that the voting practice at issue intentionally discriminates against minority voters.

IV. Whether the three judge panel erred in holding that the Attorney General's preclearance of the 1968 Municipal Elections Code which required the City to use majority vote did not also preclear the City's use of majority vote.

PARTIES

All parties to the proceeding below are:

United States of America

City of Monroe, Georgia

Harry Knight, In His Official Capacity as Mayor of the
City of Monroe

Monroe City Council:

Randy Peppers, In His Official Capacity as Member
of the Monroe City Council

Jerry Smith, In His Official Capacity as Member of
the Monroe City Council

Hugh Bolton, In His Official Capacity as Member of
the Monroe City Council

Phillip J. Enslen, In His Official Capacity as Member
of the Monroe City Council

Rosemary B. Mathews, In Her Official Capacity as
Member of the Monroe City Council

Larry Wayne Adcock, In His Official Capacity as
Member of the Monroe City Council

Sara Campbell, In her Official Capacity as City Clerk for
the City of Monroe

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The Sealed Appendix ("S. App. —") contains internal Department of Justice documents relating to the 1976 <i>Howard</i> litigation. By Order dated April 4, 1995 the three judge panel in this case required the release of these documents subject to a sealed filing requirement. Copies of the relevant discovery orders along with the subject documents and a table of contents are set forth in the Sealed Appendix.	

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. _____

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE ADCOCK, Members of the Monroe City Council; SARA CAMPBELL, City Clerk,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia
Athens Division

JURISDICTIONAL STATEMENT

OPINION BELOW

The Memorandum Order and Opinion of the three judge panel of the United States District Court for the Middle District of Georgia holding that the City of Monroe, its City Council and Mayor are enjoined from utilizing majority vote in mayoral elections until such

time as Section 5 preclearance is obtained is reproduced at App. A, pp. 1a-37a and App. B, pp. 38a, 39a respectively.

JURISDICTION

This is an appeal from an Order and Judgment entered April 21, 1997, of the three judge court enjoining the City of Monroe, its City Council and Mayor from conducting mayoral elections by majority vote until such time as the City obtains Section 5 preclearance for majority vote. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISIONS INVOLVED

This appeal involves Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c. The text of these statutes are set forth at App. E, pp. 44a-46a.

STATEMENT OF THE CASE

Proceedings Below. The complaint in this action was filed on June 3, 1994. Plaintiff challenged under Section 2 and Section 5 of the Voting Rights Act the City of Monroe's at-large, majority vote method of electing the City Council and the majority vote method of electing the Mayor.

In 1995, the parties reached a settlement regarding the method of electing the City Council. The City of Monroe submitted a plan to the Attorney General which was precleared under Section 5. The new City Council election format requires majority vote elections; however, the Attorney General refused to preclear majority vote for the Mayor.

After resolving the method of electing the City Council, the sole remaining issue in the lawsuit was whether the City of Monroe was required to submit the majority vote method of electing the Mayor for Section 5 preclearance. On January 4, 1995, the parties filed cross-

motions for summary judgment on the Section 5 mayoral issue. The three judge panel heard oral argument on the motions on August 8, 1996. At oral argument, the three judge panel requested post argument briefs. That briefing was complete on September 5, 1996.

On April 15, 1997, the three judge panel filed its Order and Memorandum Opinion finding in favor of the United States on its Section 5 claims as to the election for the office of Mayor. On April 21, 1997, the three judge panel entered its Judgment permanently enjoining the City of Monroe, its Council and Mayor from utilizing majority vote to elect the Mayor unless and until they obtained Section 5 preclearance.

On May 21, 1997, Defendants filed their Notice of Appeal. On June 24, 1997, Defendants filed their Motion to Stay enforcement of the injunction pending appeal. By Order dated June 30, 1997, the three judge panel denied Defendants' Motion to Stay. On July 15, 1997, Defendants filed an Application to Stay Enforcement of the Injunction with this Court.

Statement of the Facts. The factual findings contained in the three judge panel's Opinion are accurate as far as they go. However, the City of Monroe (hereinafter "the City") contends that those findings perhaps understate the Department of Justice's analysis of the City's use of majority vote in 1976. Thus, except as outlined in Substantial Question I of this Statement, the City does not dispute the three judge panel's factual findings. However, the City believes that a brief explanation of circumstances which led up to this litigation is important to a full understanding of the issues submitted for review.

The City is a subdivision of the State of Georgia located in Walton County. The City has a total population of 9,759 people of whom 3,991 (40.9%) are African-American. The City has a total voting age population of 6,915 individuals of whom 2,539 (36.7%) are African-American. From 1966 until July 1995, the City's Coun-

cil members were elected at-large by majority vote. The Mayor was likewise elected by majority vote.

In 1990, when the Attorney General first purported to "object" to the City's use of majority vote, the City and its elected officials began discussions with the Department of Justice to transform the City's at-large council system to a type of single-member system. In March 1992, the City submitted to the State of Georgia a proposed amendment to the City's charter which would have changed the at-large method of electing the Council to a six-member system with four single-member districts and two "super" districts. The two super districts comprised one half of the City. The proposal included ward and residency requirements and the Council and Mayor were to be elected by majority vote.

Two of the six proposed council districts were majority African-American districts which fairly corresponded to the African-American voting age population of 36.7%. The State of Georgia approved the charter amendment subject to preclearance by the Attorney General. Soon thereafter, the City submitted its plan to the Department of Justice for preclearance. After requesting and receiving from the City voluminous documents and after engaging in extensive communications with a small number of African-American citizens in Monroe, the Department of Justice rejected the City's proposed plan. A primary basis for the Department of Justice's rejection of the plan was that it did not contain three majority African-American districts as demanded by private advocates. After substantial pressure from the Department of Justice and threats of litigation, the Council again considered whether to acquiesce to the Department of Justice's demands for three majority African-American district in a six district format. When the City disagreed with the demands of the Department of Justice, the Department instituted this lawsuit.

Early in the litigation, the originating District Court judge held a telephonic status conference in which counsel

for the City explained the City's fruitless attempts to replace its at-large system with an appropriate single member district system. The City further suggested that the District Court require mediation or some form of alternative dispute resolution so that the parties could quickly and cost-effectively reach an acceptable method of electing the council. At the urging of the originating judge, the United States agreed to negotiate with the City. In those negotiations, the City proposed a "six and two" plan containing six single-member districts and two super districts. Three of the eight districts were majority African-American districts. As part of its plan, the City proposed that the council members be elected by majority vote. Although the Department of Justice challenged in this lawsuit the City's majority vote requirement for the Council, the Department of Justice agreed that majority vote was appropriate and supported, if not mandated, majority vote for the new Council format. In May 1995, the City submitted the "six and two" plan for preclearance and, in July 1995, the Attorney General granted preclearance. (App. A, pp. 11a, 12a).

As part of the settlement, the City requested preclearance for majority vote for the Mayor. The Department of Justice refused. Accordingly, the parties commenced litigation on the issue of whether preclearance for majority vote for the Mayor was required under Section 5 and the facts of this case. The parties set a briefing schedule for summary judgment and continued with discovery on the Section 5 issue. In discovery, the City sought documents withheld from discovery by the Department of Justice which related to the Department's 1976 analysis of the City's use of majority vote. The Department of Justice vigorously resisted the City's discovery requests on this issue and forced the City to file a motion to compel. The three judge panel granted the City's motion finding the *Howard* documents "extremely relevant" to the City's defenses. (S. App. 1-6). The Department of Justice then turned over the *Howard* documents.

As set forth in the three judge panel's Opinion, the Court rejected the City's contentions that the originating judge in *Howard* was correct on the effect of the preclearance of the 1968 Municipal Elections Code and further held that the Department of Justice could not be barred by equitable principals from pursuing Section 5 litigation against the City eighteen years after it had privately conducted an extensive factual and legal analysis of the City's use of majority vote and elected not to interpose an objection. The three judge panel entered judgment in favor of the United States enjoining the City from using majority vote to elect the Mayor until such time as Section 5 preclearance is obtained. (App. C, pp. 40a, 41a).

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. THIS COURT'S ANALYSIS IN *McCain v. Lybrand* AFFORDS THE BASIS FOR FINDING THAT PRE-CLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT OCCURS WHERE THE ATTORNEY GENERAL RECEIVES ACTUAL NOTICE OF AN UNPRECLEARED VOTING PRACTICE AND CONDUCTS A PROMPT, IN-DEPTH ANALYSIS OF THAT VOTING PRACTICE THEN AFFIRMATIVELY DECIDES TO NEITHER INTERPOSE A SECTION 5 OBJECTION NOR REQUEST A SECTION 5 SUBMISSION.

From 1976 until March 1995 when the three judge panel granted the City's Motion to Compel in this case, the Department of Justice has avoided acknowledging the existence and extent of its Section 5 deliberations in 1976 regarding the City's use of majority vote. However, as memorialized by documents in the Sealed Appendix, the City's use of majority vote was the subject of a vigorous and substantial Section 5 analysis by the Department of Justice in 1976. Two events triggered the Department's Section 5 analysis. First, on August 12, 1976,

approximately one week after the final order was entered in the *Howard* litigation, plaintiff's counsel in that case, David F. Walbert, sent a letter to Gerald Jones of the Voting Rights Section of the Department of Justice informing the Department of the *Howard* Court's July 29, 1976 ruling that the City's use of majority vote was mandated by the 1968 Georgia Municipal Elections Code. (App. G, pp. 54a-56a). Mr. Walbert asked the Department of Justice to intervene in the *Howard* litigation and appeal the matter to this Court. Mr. Walbert characterized the *Howard* Court's majority vote ruling as "one of general importance to most of the municipalities in the State" (App. G, pp. 54a-56a). Mr. Walbert requested that the Department of Justice "as the enforcer of Section V" either intervene in the *Howard* litigation or file a separate suit if the Department of Justice "agreed with our positions and would see fit to intervene." (App. G, pp. 54a-56).

Second, and coincidentally on the very same day, counsel for the City of Monroe submitted to the Department of Justice for Section 5 preclearance the annexation ordinances at issue in the *Howard* litigation. (App. A, p. 8a). In its August 12, 1976 Section 5 submission letter, the City expressly referenced the *Howard* litigation and even attached as exhibits to that letter copies of the relevant court orders. (App. A, p. 8a).

In response to Mr. Walbert's August 12, 1976 request that the Department of Justice intervene in the *Howard* suit, the Department of Justice initiated a thorough and sifting evaluation of the City's use of majority vote, the position of the parties in *Howard*, the propriety of intervening in the *Howard* litigation, and the propriety of interposing an objection to the City's use of majority vote. (S. App. pp. 7, 9-12, 13-20, 24-30, 31, 32, 32-43). Specifically, in a handwritten memo dated September 1, 1976, Gerald Jones instructed Voting Rights Section attorneys "to give the City's use of majority vote a 'prompt, in-depth' study to see if there is anything we can do

here." (S. App. p.7). As set forth in the Sealed Appendix, several substantial memoranda generated in response to Mr. Jones' directive demonstrate that a vigorous debate ensued in which the participants were divided on whether the *Howard* Court was correct in its majority vote ruling, whether the Department of Justice would intervene in *Howard*, or whether the Department would even bother to ask the City to submit the majority vote method of election for preclearance under Section 5. (S. App. pp. 9-12, 13-30, 24-30, 33-43).

One of the participants in the debate, David Hunter, prepared a draft "please submit" letter designed to inform the City that its use of majority vote must be submitted for Section 5 preclearance. (S. App., pp. 41-43). However, after considering the positions of the advocates in the internal deliberations and after circulating the "please submit" letter for review within the Department of Justice, the Attorney General elected not to object to the City's use of majority vote or intervene in the *Howard* suit. Moreover, the Attorney General elected not to request that the City submit the majority vote issue for preclearance even though the "please submit" letter was drafted, edited, and apparently in final form. (S. App., p. 32). This Section 5 determination is memorialized by the handwritten notation "NOT SENT" located prominently at the top of Mr. Hunter's "please submit" letter. (S. App., pp. 41-43). Thus, it is undisputed that no objection letter or "please submit" letter was ever sent. It is further undisputed that the Department of Justice let the issue lay dormant for fourteen years before purporting to interpose an "objection" to the City's use of majority vote (App. A, p. 10a) and eighteen years before filing a Section 5 lawsuit.

The Department of Justice's "prompt, in-depth" analysis of the majority vote preclearance issue was conducted in conjunction with the City's undisputedly "proper" Sec-

tion 5 submission of the annexations at issue in the *Howard* suit. (App., pp. 8a-10a). As the three judge panel acknowledges, but attempts to minimize, a focal point of the Section 5 analysis of the annexations was the effect the annexations would have in the context of the City's use of majority vote. (App., p. 9a). On September 14, 1976, Mr. Walbert, who weighed in on the Section 5 debate on behalf of his clients, specifically asked the Attorney General to address whether the City met its burden under Section 5 in light of the alleged dilution effect of the City's majority vote requirement.

Taking Mr. Walbert's lead, J. Stanley Pottinger, Assistant Attorney General with the Department of Justice, sent the City a letter on October 13, 1977 objecting under Section 5 to two of the annexations. In that letter, Mr. Pottinger specifically stated that a Section 5 inquiry included the consideration of the "local electoral system". (App. A, p. 24a). Mr. Pottinger's analysis lead the Department of Justice to make a Section 5 objection on the grounds that "an at large system with residency and majority vote requirements" may make the annexations inappropriate under Section 5. Over the next year, the City provided information to the Department of Justice regarding the annexations. Finally, on November 25, 1977, the Department of Justice withdrew its objection to the annexations. (App. A., p. 9a). In reaching its conclusion, the Department of Justice specifically relied upon the demographic and electoral context of the City of Monroe. (App. A, pp. 9a, 10a, S. App., pp. 7-69).

From these undisputed facts, the three judge panel concluded that this Court's decision in *McCain vs. Lybrand*, 465 U.S. 236 (1984), controlled the analysis and required a finding that the City's use of majority vote had not been expressly or implicitly precleared in connection with the 1976 *Howard* litigation. (App. A., p. 22a). The City contends that *McCain* supports rather than under-

mines its position in this case. This Court's analysis in *McCain* was fundamentally predicated upon the distinction between preclearance based on constructive notice to the Attorney General of an unprecleared change and preclearance based on actual notice to the Attorney General followed by a substantive analysis of that unprecleared change and a failure to act. The three judge panel dismissed this crucial distinction. (App. A, p. 24a, n.14.)

In *McCain*, this Court was required to determine whether an admittedly unprecleared 1966 South Carolina State law creating a new form of government for Edgefield County, South Carolina was precleared by implication when a 1971 and unrelated submission was precleared by the Attorney General. The submitting jurisdiction in that case argued that since the unprecleared 1966 charter was incorporated by reference and implication into the 1971 charter amendment, the Attorney General's preclearance of the 1971 charter amendment constituted tacit preclearance of the 1966 amendments. However, this Court rejected that argument because the record showed that the Attorney General either did not recognize that the 1966 act required preclearance or assumed that it had been precleared. In short, there was no evidence that the Attorney General had actual knowledge that the 1966 charter amendments constituted a change from prior practice and, therefore, had been denied an opportunity to pass on the voting change under Section 5. *McCain*, at 253-254.

In fact, this Court suggested in *McCain* that it would likely have found that preclearance had occurred if the Attorney General received actual knowledge of the unprecleared change, conducted a Section 5 analysis of that change, yet took no action to object to the change or request preclearance under Section 5:

[I]t would require a wild flight of imagination to suggest that the Attorney General recognized that the

1966 Act affected changes which had required preclearance and had never been precleared and then did not ask state officials to explain the failure to preclear those changes but instead embarked on the task of gathering the information necessary to evaluate those alterations on his own rather than requesting state officials to provide the information to him as he had done regarding the changes made by the 1971 amendment. It is even more unlikely that he would have kept his consideration and approval of the changes made by the 1966 Act a secret from state officials in his letter preclearing the 1971 amendment. *McCain*, 465 U.S. at 254 [footnote omitted].

This Court further noted that "if the Attorney General was aware that the Act required preclearance and had never been precleared, his failure to request either an explanation or at least some additional information would be difficult to comprehend." *McCain*, 465 U.S. at 254. The hypothetical conduct of the Attorney General which this Court bluntly condemned in *McCain* is the reality of the Attorney General's conduct in this case.

As this Court suggested in *McCain*, Section 5 was designed to provide actual notice to the Attorney General of an unprecleared change to give the Attorney General an opportunity to either approve the change, object to the change, or further investigate the impact of the change. Such is the purpose of the "proper submission" rule laid out in *McCain*, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), *United States vs. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) and *Clark v. Roemer*, 500 U.S. 646 (1991), each of which involved mere constructive notice of an unprecleared change. In the present case, the goal of Section 5 was accomplished. The Attorney General had an opportunity to, and in fact conducted an extensive evaluation of the City's use of majority vote and elected not to interpose an objection or exercise any Section 5 authority.

II. THE ATTORNEY GENERAL SHOULD BE LEGALLY OR EQUITABLY BARRED FROM PURSUING A REMEDY UNDER SECTION 5 OF THE VOTING RIGHTS ACT WHERE THE ATTORNEY GENERAL HAS ACTUAL NOTICE OF AN UNPRECLEARED VOTING PRACTICE AND CONDUCTS AN IN-DEPTH ANALYSIS OF THAT VOTING PRACTICE YET FAILS TO PURSUE A SECTION 5 REMEDY FOR EIGHTEEN YEARS.

The three judge panel held that the United States is simply immune from equitable defenses under Section 5 of the Voting Rights Act. (App. A., pp. 33a, 35a). The three judge panel's ruling on this issue is inconsistent with this Court's precedent, the Attorney General's own regulations which governed its obligations in 1976, and the very structure of Section 5 itself. This Court suggested that in the Title VII context, equitable remedies may be invoked against the E.E.O.C. where the E.E.O.C. has inordinately delayed in filing an action, thereby prejudicing the employers' ability to properly defend the suit. *Occidental Life Insurance Company v. E.E.O.C.*, 432 U.S. 355 (1977). The three judge panel properly noted that lower courts have relied on *Occidental Life* to dismiss E.E.O.C. actions on equitable grounds which have been inordinately delayed. The three judge panel, however, rejected the logic of the *Occidental Life* analysis in the Section 5 context. (App. A, pp. 30a-32a).

However, the very structure of Section 5 of the Voting Rights Act itself invites a finding of laches, estoppel, or waiver to bar the Government's Section 5 suit in this case. This case presents a far more compelling case for the application of equitable time-based defenses than Title VII. Under Section 5, where a submission has been made that is deemed to be proper by the Attorney General, the Attorney General has only sixty days within which to interpose an objection. 42 U.S.C. § 1973c. Under this Court's decision in *Morris v. Gressette*, 432 U.S. 491 (1977), if the Attorney General fails to enter an objection within the sixty day period for any reason whatsoever,

the voting change is deemed precleared as a matter of law. *Morris*, 432 U.S. at 502-503. The three judge panel apparently read Section 5 to require evidence that the Attorney General in fact embarked upon the supposed "difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect" before preclearance occurs. (App. A, pp. 22a-24a). However, contrary to the three judge panel's interpretation of Section 5, preclearance under the administrative option "is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect." *Morris*, 432 U.S. at 502. This Court properly observed in *Morris* that in the administrative preclearance process, "compliance with Section 5 is measured solely by the absence, for whatever reason of a timely objection on the part of the Attorney General." When the Attorney General fails to enter a timely objection, even through administrative neglect, "there is no further remedy provided by Section 5." *Morris*, 432 U.S. at 502, 503 citing *Allen v. State Board of Elections*, 393 U.S. 544, 549-550 (1969).

This Court has strictly interpreted Congress' sixty day deliberation period. This interpretation is consistent with this Court's recognition of "the potential severity of the § 5 remedy, the statutory language and the legislative history. . . ." of Section 5. *Morris*, 432 U.S. at 504. Thus, as the three judge panel accurately observed, if the Attorney General fails to interpose a timely objection within the sixty day deadline even through administrative neglect or error, the Attorney General is forever barred from pursuing a Section 5 remedy regarding the voting change at issue. (App. A, pp. 28a, 29a). Moreover, in the administrative neglect scenario, the voting change would be deemed precleared without any inquiry into whether the voting practice was free from discriminatory purpose or effect. If the Attorney General can be forever barred from pursuing a Section 5 remedy based on even an inadvertent failure to object in the administrative preclearance procedure, it certainly would not be inconsistent

to find that the Department of Justice's fourteen year failure to object and eighteen year failure to pursue a Section 5 remedy after actual notice and substantive evaluation of the unprecleared change would likewise act as a legal or equitable bar to its Section 5 claims.

Moreover, the Code of Federal Regulations applicable in 1976 relating to Section 5 submissions required the Attorney General to request the submission of voting changes from covered jurisdictions where the Attorney General had actual knowledge that a change had occurred but had not been submitted for preclearance. See 28 C.F.R. § 51.15(b) (1971) ("[i]f no submission has been made, the Attorney General shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement"). This regulation was mandatory, and it is undisputed that the Attorney General failed to abide by it. The three judge panel did not address this argument.

In rejecting the City's equitable defenses, the three judge panel placed great weight on the important nature of the public right for which the Attorney General is responsible. (App. A, p. 27a). However, the three judge panel disregarded the fact that under the Voting Rights Act, a Section 5 determination of preclearance whether through affirmative analysis or administrative neglect never deprives the government of its statutory right to file a Section 2 lawsuit to challenge an alleged discriminatory voting practice. Rather than exercise that option, the United States would prefer to place on the City the burden of proving an absence of discrimination relating to an electoral change which occurred thirty-one years ago and, in the City's view, had been finally resolved in litigation and through the Attorney General's own conduct in 1976.

The three judge panel also seemed concerned that allowing equitable defenses to be lodged against the government in Section 5 cases would "encourage jurisdictions aware of

existing, unprecleared changes not to submit those changes for immediate preclearance, but instead to comb through the files of the Department of Justice looking for evidence that might lead to a 'preclearance by estoppel.'" (App. A, p. 28a). The three judge panel's concern on this issue is misplaced. The three judge panel held in its discovery orders that the City had a right to review the Department of Justice's files where the Department placed its conduct in the Section 5 process at issue by filing a lawsuit eighteen years after conducting a Section 5 analysis of the voting practice at issue and after electing to waive its Section 5 prerogatives. (S. App., pp. 1-7). As the three judge panel acknowledged by its discovery rulings, that is a defendant's right in discovery in a civil lawsuit.

Moreover, if anything, the three judge panel's ruling in this case will be more likely to encourage the Department of Justice itself to "comb" through its old files to resurrect Section 5 issues where it would like to impose a Section 2 remedy but may be unable to prove a Section 2 violation. Such unwarranted deference to the Attorney General under Section 5 severely prejudices covered jurisdictions like the City which, due to the passage of time, would have no meaningful way to defend or pursue the type of Section 5 suit that has been imposed upon it in this case.

III. THE ATTORNEY GENERAL MAY NOT UTILIZE SECTION 5 OF THE VOTING RIGHTS ACT TO ACHIEVE A SECTION 2 REMEDY WHERE THERE IS AN ABSENCE OF EVIDENCE THAT THE VOTING PRACTICE AT ISSUE INTENTIONALLY DISCRIMINATES AGAINST MINORITY VOTERS.

The three judge panel's injunction effectively affords the United States the same relief it would have obtained had it been able to prove that the City's use of majority vote to elect the mayor violated Section 2 of the Voting Rights Act. Since the City is enjoined from using majority vote for mayoral elections and the Department of Justice is unwilling to preclear majority vote for the mayor, the City will have no choice but to elect the mayor

by plurality vote. This is tantamount to a Section 2 victory for the Department of Justice without any findings that the City's use of majority vote to elect the mayor is discriminatory. Under *Miller v. Johnson*, 115 S.Ct. 2475 (1995), and its recent progeny, the Attorney General cannot abuse its Section 5 authority to impose a Section 2 remedy. That is precisely what the Attorney General has done in this case. The Attorney General manufactured a Section 5 lawsuit in this case eighteen years after a prior Department administration finally resolved the issue in the City's favor. All the City requests is that under the unique facts of this case, the Section 5 injunction be lifted leaving the government the opportunity to challenge majority vote under Section 2 for the mayor if it believes that is appropriate.

IV. THE THREE JUDGE PANEL ERRED IN HOLDING THAT THE ATTORNEY GENERAL'S PRECLEARANCE OF THE 1968 MUNICIPAL ELECTIONS CODE WHICH REQUIRED THE CITY TO USE MAJORITY VOTE DID NOT ALSO PRECLEAR THE CITY'S USE OF MAJORITY VOTE.

The three judge panel held that this Court's footnote analysis in *City of Rome v. United States*, 446 U.S. 156 (1980), was dispositive of the City's arguments that preclearance of the 1968 Georgia Municipal Elections Code and its majority vote requirement logically constituted preclearance for the City's use of majority vote pursuant to the Code. (App. A, p. 19a). The City argued that this Court's footnote analysis was not central to the issues presented in *City of Rome* and that the present case presented a better and more direct opportunity to appropriately analyze the effect of the Attorney General's preclearance of the 1968 Code.

As set forth in the three judge panel's Opinion, the parties in this case developed a thorough record regarding the 1968 Municipal Elections Code and directly litigated that issue as a primary issue in this lawsuit. The language

of the 1968 Code as it relates to majority vote is clear. Where a city's charter is silent on the question of majority or plurality vote, majority vote is mandatory. (App. F, pp. 47a-52a). To read the Municipal Elections Code in any other manner would render a valid and precleared state elections law a complete nullity. (App. F, pp. 47a-52a). This view was the originating judge's analysis in the *Howard* litigation in 1976. (App. F, pp. 47a-52a). The record in this case suggests that the Department of Justice agreed with the analysis of the originating judge in *Howard* when the Department conducted its own independent review of that decision in 1976.

This case affords this Court an opportunity to thoroughly address the impact of the Attorney General's preclearance of the 1968 Municipal Elections Code as it relates to the majority vote requirement and clear any confusion that may be created by the three judge panel's reliance on this Court's footnote analysis in *City of Rome*.

CONCLUSION

For the foregoing reasons, appellants respectfully submit that the questions it presents are substantial, and they request that this Court docket this appeal for full briefing and argument.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[Filed April 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

3:94-cv-45 (WDO)

UNITED STATES OF AMERICA,
vs. *Plaintiff,*
CITY OF MONROE, GA., *et al.,*
Defendants.

Before ANDERSON, Circuit Judge, FITZPATRICK,
Chief Judge, and OWENS, District Judge.

MEMORANDUM OPINION

In the instant case, the United States seeks an injunction barring the City of Monroe from using a majority-vote requirement in its mayoral elections until this requirement receives federal approval according to Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. For the reasons set out below, we conclude that the United States is entitled to relief.

Before we address the precise arguments advanced by the parties, we briefly summarize the scope of our jurisdiction in a § 5 suit and set out the historical facts regarding the City of Monroe's majority-vote requirement and the procedural posture of the case today.

I. THE SCOPE OF OUR § 5 INQUIRY

Section 5 of the Voting Rights Act of 1965 requires covered jurisdictions to gain federal approval before enforcing any "voting qualifications or prerequisite to voting,

or standard, practice, or procedure with the respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Federal approval, known as "preclearance," may be gained by obtaining a declaratory judgment from the District Court for the District of Columbia to the effect that the change involved "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Id.* Alternatively, a jurisdiction may elect to seek preclearance from the United States Attorney General: if the Attorney General has not interposed an objection within sixty days after the jurisdiction submits the change or if the Attorney General has affirmatively indicated that no objection will be made, then the State may enforce the change. Pending either form of preclearance, "[s]tatutory provisions constituting changes in election practices are not 'effective as laws. . . .'" *McCain v. Lybrand*, 104 S.Ct. 1037, 1043 (1984) (quoting *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975) (per curiam)).

It is well-established that either the Attorney General or a private plaintiff may bring an action in the district courts to enforce the preclearance mandate of § 5. *Allen v. State Board of Elections*, 89 S.Ct. 817, 826-27 (1969); 42 U.S.C. § 1973j(d). According to the express terms of the Act, any such action must be heard by a three-judge panel in accordance with the provisions of 28 U.S.C. § 2284. 42 U.S.C. § 1973c. When presented with a § 5 suit, a three-judge panel such as the one convened here today may determine only "(I) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart v. United States*, 103 S.Ct. 998, 1001 n.3 (1983). What we may *not* decide is "what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the

determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the rights to vote on account of race or color.'" *Perkins v. Matthews*, 91 S.Ct. 431, 435 (1971).

II. FACTS AND PROCEDURAL POSTURE

A. *Historical Facts Regarding the City's Election Practices*¹

The City of Monroe is a municipal corporation created by legislative act of the General Assembly of Georgia; the City derives all of its powers from this and from subsequent legislative acts. Prior to November 1, 1964 (the baseline date from which § 5 changes are measured), the City of Monroe's charter did not specify whether election of the mayor and city council would be by majority vote or by a plurality. However, the parties agree that prior to November 1, 1964, the City used a plurality-vote requirement to decide races in which more than two candidates ran for office.

In 1966, the General Assembly amended the City's charter to require that the election of the mayor and the members of the city council be determined by majority vote. 1966 Ga. Laws 2457, 2459. Although the amendment was neither submitted to the Attorney General nor was a declaratory judgment brought before the District Court for the District of Columbia, the City proceeded to conduct elections under the majority rule imposed by the new charter.

In 1968, the General Assembly enacted a comprehensive Municipal Election Code applicable to all Georgia municipalities including the City of Monroe. (We refer to this statute as "the 1968 Statewide Code.") Section 34A-1407 of the Code reads in relevant part:

¹ We find the parties in agreement as to the facts material to this litigation.

Municipal Charter to govern vote required for nomination; runoff primary or election—(a) If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

By letter dated May 13, 1968, the State of Georgia submitted the Statewide Code to the Attorney General for § 5 preclearance. The State of Georgia's application noted:

Heretofore, the laws governing municipal elections have been contained in the charters of the more than 400 incorporated towns and cities in Georgia. These charter provisions as to elections have been amended from time to time. . . . As a consequence, there have been as many or more variations in the municipal election laws in Georgia as there are municipalities.

. . .

At the 1968 Session of the Georgia Assembly of Georgia, there was enacted the "Georgia Municipal Election Code," . . . which codifies and makes uniform . . . throughout the State (with certain options hereinafter noted) municipal election laws.

. . .

In view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the Municipal Election Code. In view of its comprehensive nature, the Municipal Election Code when read in sequene is

comprehensible, and therefore only its more significant features will be discussed herein.

The State then provided a list of the major areas in which this Code differed from the general election code governing nonmunicipal elections. In this list, the State referred to § 34A-1407 as follows:

Whether the majority or plurality rule is in effect in the municipal election will depend upon how the municipality's charter is written at present or may be written in [the] future (i.e., charter may provide that the top 3 or top 5, etc., be elected as city commisisoners).

On July 11, 1968, the Attorney General responded to the State's submission, objecting to certain provisions of the 1968 Statewide Code. No objection was interposed regarding § 34A-1407(a).

Three years later, in 1971, the General Assembly enacted a comprehensive revision of the City of Monroe's charter. Section 2.03 of the 1971 charter reads in pertinent part:

The candidate for mayor who receives a majority of votes cast in said election and the two candidates for councilmen who receive a majority of votes cast in their respective elections shall be elected for terms of office of two years each and until their successors are duly elected and qualified.

1971 Ga. Laws 3221, 3227. Like the 1966 charter revision, Section 2.03 was neither submitted to the Attorney General nor made the basis of a declaratory judgment action before the District Court for the District of Columbia.

In 1976, two black citizens of Monroe brought § 5 suit against the City, alleging that neither the majority-vote provision of the 1966 Charter nor the majority vote provision of the 1971 Charter had been precleared accord-

ing to the mandates of the Act. In addition, the plaintiffs complained that three annexation ordinances had not been properly precleared. On July 29, 1976, a three-judge panel agreed with the plaintiffs, holding that "[t]he enactment of a majority vote requirement is subject to section five, and those laws cannot therefore be further utilized until its procedures have been followed." *Howard v. Board of Commissioners of Walton County*, No. 75-67-ATH, slip op. at 3 (M.D. Ga. July 29, 1976). Accordingly, the three-judge panel enjoined enforcement of "[t]hose parts of [the 1966 and 1971 Charters] which provide for election of the mayor and councilmen of the City of Monroe by majority vote. . . ." *Id.* at 5. The panel similarly held that the annexations had not been precleared as required and, therefore, that defendants were enjoined from enforcing the ordinances effecting the annexations.

In its order, the three-judge panel noted that the City claimed that even if enforcement of the 1966 and 1971 charter provisions was enjoined, the 1968 Statewide Code mandated majority-vote elections in all cities except those whose charter provided otherwise. "This general statute was enacted in 1968, [1968 Ga. Laws 885]," noted the panel, "and according to the parties has been approved by the Attorney General pursuant to section five."² *Id.* at 4. The panel wrote, "The application of this general law in this instance and the resolution of this issue does not require a three-judge court." *Id.* Accordingly, the case was remanded to the originating judge for further proceedings consistent with the panel's opinion.

² When the parties made this representation to the court, they did not have the benefit of the Supreme Court decision in *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548 (1980), which was not decided until almost four years later. In *City of Rome*, the Court held that the preclearance of the 1968 Statewide Code did not preclear the majority-vote provision in the several municipalities. See discussion in Part V.A. *infra*.

On July 29, 1976, the originating judge issued an order responding to the panel's request. With respect to the City of Monroe, the judge wrote:

The issue concerning the city is whether a majority or plurality vote is required for the election of mayor and councilmen.

The 1971 city charter, [1971] Ga. Laws 3221, 3227, and an amendment to the predecessor charter, [1966] Ga. Laws 2458, provided for the election of the mayor and council by a majority vote. Both of these statutes having been declared unenforceable under section five, the remaining city charter is silent as to whether a plurality or majority vote is required. The parties agree that the city conducted plurality elections until enactment of [1966] Ga. Laws 2458.

Georgia's Municipal Election Code, Ga. Code Ann. § 34A-1407(a), provides:

If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

Since neither the charter nor an ordinance of the City of Monroe now or ever has provided for a plurality election, this general law, which the parties have informed the court was approved by the Attorney General of the United States as required by section five, clearly applies here and requires election by majority vote. Plaintiffs' argument that the Monroe city charter

must have provided for election by plurality vote because the city conducted elections on a plurality basis prior to the 1966 law is not persuasive. Such an interpretation would make a nullity of this general statute and void its obvious purpose of establishing an unambiguous rule for municipalities with charters lacking an express requirement.

Howard v. Board of Commissioners of Walton County, No. 75-67-ATH, op. at 3-4 (M.D. Ga. July 29, 1976).

On August 12, 1976, two weeks after the three-judge panel issued its order, the City submitted to the Attorney General the three annexations that the *Howard* court determined required preclearance. Attached to the submission were copies of the three-judge court's decision and the originating judge's order. Four days later, on August 16, the Attorney General received a letter from David Walbert, counsel for the *Howard* plaintiffs. In his letter, Walbert focused on the *Howard* court's resolution of the issue regarding the City's majority-vote requirement: he described the court's rejection of his argument that despite preclearance of the 1968 Act, individual municipalities were required to have § 5 approval before implementing the majority vote. Walbert wrote:

We are presently debating an appeal based on the same issues we briefly outlined in the trial court. . . .

My question to you is whether the Department of Justice would have an interest in this case. If the Department, as the enforcer of Section V, agreed with our positions and would see fit to intervene in the case, our chances would be vastly improved in my opinion. . . .

Walbert's letter indicates that he also submitted a copy of an order from the *Howard* litigation.

During discovery in this case, the Attorney General produced its internal records with regard to the inter-

vention request from Mr. Walbert and the request from the City for preclearance of its annexations. The records reveal that the internal discussions within the Attorney General's office during the fall of 1976 and 1977 focused on two matters. First, we find some discussions regarding whether the City's majority-vote requirement had already been precleared. This discussion related to whether or not the Attorney General's previous preclearance of the 1968 Statewide Code precleared the majority-vote requirement in the City of Monroe. Second, we find deliberations concerning whether the annexations proposed by the City would have a discriminatory purpose or effect. To answer this question, the Attorney General of course took into account the election practices of the City, and thus the annexation deliberations include frequent references to the City's majority-vote requirement.

As for the annexation deliberations, the record reveals the following events. By letter dated October 13, 1976, the Attorney General interposed an objection to two of the three annexations proposed by the City of Monroe. On October 18, 1976, the City's attorney requested that the City be allowed to submit further evidence and that the Attorney General reconsider its objection; the City also requested a conference with representatives of the Attorney General. On May 26, 1977, the conference requested by the City Attorney was held in the Monroe. Because the meeting was not formally documented, the record does not disclose precisely what transpired at the conference. The record does reveal that the conference was attended by representatives of the Attorney General, the City of Monroe, and of the black community; similarly, it is clear that the parties discussed the history of black political participation in Monroe and Walton County. The City's request for reconsideration was considered complete on September 29, 1977, and by letter dated November 25, 1977, the Attorney General withdrew its objection to the two annexations, stating that "[a] review of this entire record reveals

that the dilution of the black population caused by these annexations was approximately one half percent and that this small degree of dilution, in the demographic and electoral context of the City of Monroe, will have no discernible racially discriminatory electoral effect."

As for the preclearance status of the majority-vote requirement, the record shows the following events. Sometime during October and November of 1976, approximately the same time as the initial denial of annexation preclearance and the request for reconsideration, David Hunter (an attorney in the Voting Rights section) prepared a memo directed to the Assistant Attorney General recommending that a letter be sent to the City of Monroe requesting that they submit their majority-vote requirement for preclearance. The memo, which was accompanied by a proposed draft for such a "please submit" letter, also recommended that the Attorney General "if necessary, participate, in *Howard v. Board of Commissioners of Walton County* (as amicus or intervenors) or bring our own suit to assure compliance with Section 5." The record reveals no further deliberation on whether to follow Hunter's recommendations; the paper trail ends abruptly with a proposed "please submit" letter across the top of which is the handwritten notation "Not sent." Because the notation is not accompanied by a date, it is impossible for us to ascertain where in the chronology of events the decision not to send the letter was made.³ We know only that there was discussion as to whether the previous preclearance of the 1968 Statewide Code precleared the City's majority-vote requirement and that the Attorney General did not implement the Hunter recommendation—i.e., the City of Monroe was not advised that it should submit its majority-vote requirement for preclearance.

³ A routing and transmittal slip dated January 5, 1977, suggests that the "please submit" letter was still being circulated through the Voting Rights section at that time. We find no further hints as to the timing of or rationale for the decision not to send the letter.

In 1990, thirteen years after the *Howard* litigation began, the Georgia General Assembly again enacted an amendment to Monroe's charter. The preamble to the Act describes the purposes of the amendment as follows: "to change the date of municipal elections; to provide for election of the mayor and councilmembers; to provide for terms; to repeal conflicting laws; and for other purposes." 1990 Ga. Laws 4163. Section 1 of the 1990 Act carries forward the majority-vote requirement found in the City's previous charters. 1990 Ga. Laws 4163, 4163-4165.

On September 26, 1990, the city attorney sent a copy of the 1990 Act to the Attorney General for Section 5 preclearance. The letter accompanying the submission singled out various changes effected by the legislation regarding the date of elections, the length of terms, and the staggering of councilmembers' terms; the letter made no specific reference to the majority-vote provision. In reviewing this submission, the Attorney General's attention again turned to the majority-vote requirement and its tortuous history.⁴ The Attorney General requested copies of the 1966 and 1971 charters, which the City submitted in accordance with the request. On July 3, 1991, the Assistant Attorney General informed the City that the Attorney General objected to the change from plurality voting to majority voting. Although the City twice requested reconsideration, the Attorney General refused to withdraw the objection. On June 3, 1994, the United States filed the instant suit against the City of Monroe, its mayor, councilmembers, and city clerk (collectively described as "the City"), alleging *inter alia* that the enforcement of the majority-vote requirement in the City's mayoral elections violates § 5.⁵

⁴ The 1990 submission and the ensuing correspondence is like the 1976 documentation, voluminous and complicated. Because none of the issues implicated in this case turns on the precise details of the events occurring between 1990-1993, we do not dwell on these details.

⁵ The complaint originally filed by the United States includes additional claims not before us today. In addition to the § 5 claim

B. *Procedural Posture of the Instant Case*

The United States and the City of Monroe have each filed a motion for summary judgment on the § 5 claim regarding the majority-vote requirement for the City's mayoral elections. On August 9, 1996, the panel heard oral argument on the parties' summary judgment motions. Because it is clear that the parties do not dispute the facts material to this litigation, but only the legal significance of those facts, summary judgment is appropriate at this time.

III. PRECLUSIVE EFFECTS OF THE *HOWARD* LITIGATION

Before we proceed to address the questions we are directed to answer in a § 5 case—i.e., whether § 5 covers the contested change, whether that change has been precluded, and if not, what remedy is appropriate—we must address the City's argument that the United States's suit is barred by the preclusive effects of the decision in *Howard v. Board of Commissioners*. After reviewing the case law, we conclude that there is an insufficient identity of parties to invoke issue or claim preclusion. See *Montana v. United States*, 99 S.Ct. 970, 973 (1979) ("A fundamental precept of commonlaw adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that 'a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit *between the same parties or their privies* . . .'" (emphasis added)).

regarding the mayoral elections, Count I alleged that the use of majority vote in the city-council elections violated § 5. Count II alleged that the City's majority-vote requirement and at-large election of its councilmembers violated § 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments. During the course of this litigation, the United States and the City of Monroe reached an agreement regarding the method of electing city councilmembers.

On these facts, the Attorney General cannot be barred from relitigating the claims and issues brought by the private plaintiffs in *Howard*.⁶

The City of Monroe has expended considerable time arguing that in *this* case the Attorney General was not a formal party to the litigation. We address each of the City's arguments in turn. First, the City argues that in the instant case the Attorney General should be bound because of an identity of interests between the Attorney General and the private plaintiffs in *Howard*.⁷ The City argues:

Obviously, in the present case, the United States purports to represent the same interests and individuals as did the plaintiffs in *Howard*. Indeed, the United States has its authority to bring suit only in a representative capacity on behalf of its alleged aggrieved citizens. Moreover, in the *Howard* litigation, the plaintiffs sought to make the suit a class action suit thereby demonstrating their intent to sue in a representative capacity for all alleged aggrieved persons. In this case, since the United States purports to represent all of the same individuals who were plaintiffs in the *Howard* suit (and all similarly situated persons), they are deemed to be privies for the purpose of a preclusion analysis and are therefore bound by the *Howard* decision.

This argument is foreclosed by *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979), a decision binding on this court.

⁶ Because we find an insufficient identity of parties, we make no effort to identify rigorously the claim at issue in *Howard* or the scope of issues actually litigated and decided therein. Similarly, we do not address additional arguments offered by the United States as grounds for finding no preclusion.

⁷ A non-party may be subject to the preclusive effects of a prior judgment "in certain limited circumstances [in which the non-party] . . . has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 109 S. Ct. 2180, 2184 (1989).

In *East Baton Rouge*, the Court of Appeals rejected a district court's conclusion that a suit brought by the Attorney General under the Voting Rights Act was precluded by earlier litigation conducted by private plaintiffs. The court wrote:

[The district court's conclusion is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. See, e.g., *City of Richmond v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). . . . This principle is based primarily on the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.

Second, even assuming that the United States has no independent interest, the prior suit would not bar the present action. In *United States v. Texas*, 430 F. Supp. 920 (S.D. Tex. 1977), a three-judge district court . . . found res judicata inapplicable because the prior private suits were not certified as class actions, and, therefore, the United States could represent the interests of members of the putative class who were not named plaintiffs in the previous suits. 430 F. Supp. at 926. Similarly, in the present case, although the private suit was brought as a class action, the trial judge did not certify a class prior to the dismissal. Res judicata, therefore, could not properly apply to

members of the putative class, or derivatively, to the United States.

594 F.2d at 58-59. The reasoning of the court in *East Baton Rouge* squarely rejects the precise arguments made by the City of Monroe today.

In support of its holding, the Fifth Circuit in *East Baton Rouge* relied upon the Supreme Court's decision in *City of Richmond v. United States*, 95 S.Ct. 2296 (1975). In *City of Richmond*, a voting-rights case, the Supreme Court rejected an argument that "estoppel effect" should be given to the judgment in a previous private-plaintiff suit involving the same annexation in question in *City of Richmond*. The Court wrote, "[W]e find controlling the nonparticipation of the United States and the Attorney General in [the earlier litigation]." * *Id.* at 2305 n.6. *Accord Hathorn v. Lovorn*, 102 S.Ct. 2421, 2430 n.23 (1982) ("The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not party.") (citing *City of Richmond*).

Next, the City argues that the Attorney General, though a nonparty, may be bound by a prior judgment because "there is an identity of issues and the nonparty knew of the first action yet failed to intervene to assert its claims." Clearly, the Attorney General in the instant case was

* As is suggested by the *East Baton Rouge* panel's reliance on *City of Richmond*, we strongly suspect that the Supreme Court's brief statement in that case is infused with the principles set out in more detail in *East Baton Rouge*. Since *City of Richmond*, the Supreme Court has expressly relied on the federal government's unique position to support the holding that the United States may not be collaterally estopped on an issue adjudicated against it in an earlier lawsuit brought by a different party. *United States v. Mendoza*, 104 S. Ct. 568, 572 (1984) ("We have long recognized that 'the Government is not in a position identical to that of a private litigant,' . . . both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates.") (quoting *INS v. Hibi*, 414 U.S. 5, 8, 94 S. Ct. 19, 21 (1973) (per curiam)).

aware of the *Howard* litigation and did not intervene. However, the Supreme Court has rejected the claim that a conscious decision not to intervene justifies subjecting a nonparty to the preclusive effects of a prior judgment. In *Martin v. Wilks*, 109 S.Ct. 2180 (1989), the Supreme Court concluded that a discrimination suit brought by black firefighters and resolved by consent decree could not bar white firefighters' subsequent reverse discrimination suit even though the white firefighters were aware that the black firefighters' suit could affect their interests and did not move to intervene. The Court first quoted from an earlier decision: "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 2185 (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S.Ct. 475 (1934)). The Court then addressed the way in which the Federal Rules of Civil Procedure incorporate the principle of *Chase National*, opting for a system of mandatory joinder rather than mandatory intervention. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* at 2186. We conclude that the Court's rationale indicates rejection of the City's argument.⁹

⁹ In fact, we think that where the government is the party against whom a preclusion-by-nonintervention argument is lodged, there are additional concerns mandating rejection of this argument. If the rule were indeed as the City argues, private litigants suing to enforce constitutional or statutory guarantees could force the United States to either intervene or be bound by the decision simply by giving the government notice of its interest in the pending suit. We do not believe the rules of preclusion impose such an onerous burden on the government.

Finally, the City cites *Montana v. United States*, 99 S.Ct. 970 (1979), in support of its argument that the United States is bound by the preclusive effects of *Howard*. We readily conclude that *Montana v. United States* is distinguishable from the case before us today. In *Montana*, a contractor on a federal dam project brought suit in state court contending that the Montana gross receipts tax unconstitutionally discriminated against the United States and the companies with which it contracted. In a unanimous decision, the Montana Supreme Court sustained the tax. Subsequently, the United States brought suit in federal court, arguing that the tax unconstitutionally discriminated against the United States and its contractors. The Supreme Court concluded that the federal action was barred by collateral estoppel because the United States "exercised control" over the contractor's litigation in the state court. *Id.* at 974. The following facts supported the conclusion that the "United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel": the United States required that the contractor file the state-court lawsuit; reviewed and approved the complaint; paid the attorneys' fees and costs; directed the appeal from State District Court to the Montana Supreme Court; appeared and submitted a brief as amicus in the Montana Supreme Court; directed the filing of a notice of appeal to the Supreme Court of the United States; and effectuated the contractor's abandonment of that appeal. *Id.* In the instant case, the City of Monroe has not even alleged that the United States exercised control over the *Howard* plaintiffs' litigation; in fact, what they have alleged is that the United States *refused* to take a role in the *Howard* litigation. *Montana v. United States* is therefore clearly inapposite. See *East Baton Rouge*, 594 F.2d at 58 (distinguishing *Montana* on similar grounds).

Because we cannot agree that the United States is precluded from relitigating the claims or issues before the

Howard court, we turn to the first question of our § 5 inquiry.

IV. DOES § 5 COVER THE CONTESTED CHANGE?

We address this first question *pro forma*. The City has never disputed that the shift from the pre-November 1, 1964 plurality-voting scheme to a majority-vote requirement is a change covered by § 5. Indeed, a majority-vote requirement is a clear example of a "standard, practice, or procedure with respect to voting" within the purview of § 5. See *City of Rome v. United States*, 100 S.Ct. 1548, 1553 (1980). What the City does dispute is whether this change has been precleared; this brings us to the second question of our § 5 inquiry.

V. HAS THE CHANGE BEEN PRECLEARED IN ACCORDANCE WITH § 5

The City argues that at least one of two events precleared the majority-vote requirement. We examine each of these events in turn. First, we consider the argument that the Attorney General's failure to object to § 34A-1407(a) of the 1968 Statewide Code effected a preclearance of the City's majority-vote requirement. Second, we consider the argument that a preclearance occurred because of the Attorney General's conduct during the events surrounding the *Howard* litigation and the City's annexation submission.

A. *The Lack of Objection to the 1968 Statewide Code*

In its motion for summary judgment, the City argues that "the 1968 submission and the Attorney General's response to it mandate a finding of preclearance." The City notes that its submission did call to the attention of the Attorney General both the majority vote provision and the fact that the City was not including information with respect to the several affected municipalities. The City argues that notwithstanding the foregoing, the Attor-

ney General interposed no objection and requested no additional information in order to determine the impact on specific municipalities. As the City states its argument:

[T]he Department of Justice's acceptance of the majority vote requirement as submitted, in light of the express qualifications as to the nature of the information submitted is strong evidence of the fact that the Department of Justice adopted and pre-cleared as a *matter of policy* the prevailing majority vote requirement and the imminent changes from plurality to majority vote which would be mandated.

(Emphasis in original).

In response, the United States notes that the City's submission expressly stated that the effect of the majority-vote provision "will depend upon how the municipality's charter is written at present or may be written in [the] future," thus suggesting that the preclearance issue would be presented city by city. The United States argues that the lack of objection to § 34A-1407(a) only precleared the decision to defer to local charters as to whether election would be by majority or plurality; in its view, the lack of objection did not preclear changes in individual municipalities.

We need not delve deeply into the general principles that would govern our resolution of this issue because the Supreme Court, in a case involving another of Georgia's municipalities, has rejected the precise argument made by the City of Monroe. In *City of Rome v. United States*, 100 S. Ct. 1548 (1980), the Supreme Court addressed "the constitutionality of the Voting Rights Act of 1965 and its applicability to electoral changes and annexations made by the city of Rome, Ga." *Id.* at 1552. Like the City of Monroe, Rome elected its officials by plurality vote as of November 1, 1964;¹⁰ like the City of Monroe, Rome

¹⁰ Unlike the City of Monroe, Rome's plurality-vote requirement was articulated in its pre-November 1, 1964 charter. However, this factual difference is not relevant to the application of the *City of Rome* rationale to this case.

had an unprecleared 1966 charter enacting a majority-vote requirement; and like the City of Monroe, Rome argued that despite the lack of preclearance for the 1966 charter, the City's majority-vote provision had been precleared by the Attorney General's response to the submission of the 1968 Code. The Court responded to this argument as follows:

We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Allen v. State Board of Elections*, 393 U.S. 544, 571, 89 S. Ct. 817, 834-835, 22 L.Ed.2d 1 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 137-138, 98 S. Ct. 965, 982-983, 55 L.Ed.2d 148 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only to "its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues." 472 F. Supp. 221, 233 (D.C. 1979).

Id. at 1557 n.6. The Court's rejection of Rome's argument dictates that we reject the argument Monroe makes today.

The City makes several attempts to avoid our application of *City of Rome* to the instant case. First, the City argues that the language quoted above is "mere dicta." We reject this characterization out of hand. The Supreme Court addressed an argument presented by the City that, if accepted, would have mandated reversal of the lower court's judgment (at least as to the claims to which the argument related); the Court expressly rejected that argument and proceeded to affirm the judgment of the district court. Contrary to the City of Monroe's assertions, the mere fact that the Court addressed this claim in a footnote does not affect its precedential nature.

Second, the City of Monroe argues that the Court's discussion in *City of Rome*, even if not dicta, is not dispositive of the instant case. The gist of the City's argument appears to be this: in the *City of Rome* case, the argument was that preclearance of the 1968 Act somehow "breathed life" into the unprecleared 1966 charter; by contrast, the City's argument here is that the preclearance of the 1968 Act precleared the use of majority vote in all cities, including Monroe, whose *valid* charter was silent as to whether majority or plurality voting was the rule.¹¹ We cannot agree that this distinction renders the Supreme Court's disposition of the argument before it inapposite to the argument before us today. The Court's rationale focused squarely on the notion that the State's submission of the 1968 Statewide Code did not put before the Attorney General the propriety of changes in the voting practices of individual cities:

[A]s the district court noted, the State's submission informed the Attorney General only of "its decision

¹¹ The City's argument turns on its concession that the 1966 charter, which expressly provided for majority vote, was invalid due to the lack of preclearance. Thus, the City's *valid* charter was the earlier charter, which was silent as to the question of majority or plurality vote.

to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues."

We think this rationale forecloses the City of Monroe's argument.

B. The Effect of the Events Surrounding the Howard Litigation and the City's Annexation Submission

The City also argues that it cannot be required to submit its majority-vote requirement for preclearance because the "1976 Howard-related [documentation] makes clear that the Department of Justice evaluated the City's use of majority vote in the § 5 process and that it passed muster under § 5." The gist of the City's argument seems to be that, although the majority-vote provision was never submitted to the Attorney General, and although the Attorney General never formally or expressly precleared it, the Attorney General should be deemed to have precleared the majority-vote requirement because the Attorney General actually considered and approved the change. After reviewing the record in light of the Supreme Court's preclearance jurisprudence, we must reject this "informal preclearance" argument.

The Supreme Court's decision in *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037 (1984), forecloses the argument made by the City. Although the Court seems to have assumed the possibility that preclearance might be effected informally under some circumstances,¹² the Court clearly contemplated that there could be no such preclearance short of proof that the Attorney General had actually considered and approved the merits of the change in question—i.e., determined that the change did not have a discriminatory purpose or effect. In *McCain*, the Court

¹² See *infra* note 17.

addressed a three-judge panel's conclusion that changes enacted by a 1966 statute and preserved in a 1971 amendment of the statute were precleared by the Attorney General's failure to object to a submission regarding the 1971 Act. To support its holding, the district court relied on alternative grounds, one of which was that "[the Attorney General] had considered all aspects of the electoral scheme, including the changes effected in the 1966 Act." *Id.* at 1047. At the crux of the Supreme Court's rejection of this approach was the Court's conclusion that the record did not show that the Attorney General had in fact considered and approved the 1966 changes. In other words, the record did not show that the Attorney General had conducted the appropriate evaluation of the 1966 changes, as compared to the preexisting electoral system, and concluded that the 1966 changes had neither a discriminatory purpose nor a discriminatory effect. *Id.* at 1047-49.

The record in the instant case, like the record in *McCain*, does not support an assertion that the Attorney General actually considered and approved the change made by the shift to majority voting. As the above recitation of facts shows, the Attorney General's Office had two types of documents before it in 1976 and 1977 regarding the City of Monroe: first, the *Howard* plaintiffs' request or bring a separate § 5 challenge; and second, a submission from the City of Monroe requesting preclearance of three annexations. The documents reveal that the Attorney General was aware of the following facts: that the City's elections were being conducted on the basis of a majority vote; that there was private litigation regarding whether the City's majority vote had been properly precleared; and that there was some question as to whether the failure to object to the 1968 statewide Code precleared majority voting in Monroe. The documents also suggest that, in the course of considering whether or not the submitted annexations had a discriminatory purpose or effect, the Attorney General took into account the fact that the City was using majority voting. However, nothing in either set

of correspondence shows that the Attorney General made the difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect. The discussion within the Attorney General's Office about whether the 1968 Statewide Code precleared majority voting in Monroe does not constitute the "on the merits" evaluation contemplated in *McCain* (i.e., the evaluation of whether the change from plurality to majority voting has a discriminatory purpose or effect). The same is true with respect to the evaluation of the annexations. While that evaluation was conducted on the basis of the then-current electoral practices, including majority voting, the analysis conducted by the Attorney General to determine whether the annexations had a discriminatory purpose or effect is very different from an analysis comparing plurality versus majority voting.¹³

In addition to the informal preclearance argument addressed above, the City also seems to argue that the Attorney General was aware of an arguably unprecleared change, took no action, and therefore should be deemed to have precleared the change.¹⁴ To address this argument

¹³ As for comparison of the substantive effects of plurality versus majority voting, we find in the record only an observation made by a research analyst (in the annexation analysis): "If it were not for the majority vote requirement [as opposed to a plurality], a black would have been elected to the City Council in 1970." This isolated comparison is not persuasive evidence that the Attorney General in fact addressed the difficult and complex issue of whether a shift from plurality to majority had a discriminatory purpose or effect. Moreover, this isolated comparison does not alter the fact that there is no evidence at all that the Attorney General actually concluded that the change was *devoid of* discriminatory purpose and effect.

¹⁴ This argument is most evident in the City's attempt to distinguish *McCain* on the basis of the fact that the Attorney General in *McCain* either did not recognize that the 1966 Act required preclearance or assumed that it had been precleared. *McCain*, 104 S. Ct. at 1048 n.23. The City's argument that this factual difference requires a different result is tantamount to the preclearance by estoppel argument.

(which is essentially a "preclearance by estoppel" argument), we do not find it necessary to discuss broad questions regarding when equitable estoppel principles may be invoked against the government; the Supreme Court's preclearance jurisprudence itself forecloses the argument that the Attorney General's failure to request submission bars the recovery sought before this court.¹⁵

The Supreme Court has rejected the argument that a preclearance is effected by the Attorney General's subjective awareness of an unprecleared change and failure to interpose an objection to that change. In *Allen v. State Board of Elections*, 89 S.Ct. 817 (1969), the Supreme Court refused to hold that a change in voting practices had been precleared because the Attorney General received notice of the change through the briefs of the litigation at hand but submitted no objection. The Court wrote:

A fair interpretation of the [Voting Rights] Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

¹⁵ For an opinion rejecting a somewhat different "preclearance by estoppel" argument, see *Haith v. Martin*, 618 F. Supp. 410 (D.C.N.C. 1985), *aff'd*, 106 S. Ct. 3268 (1986) (mem.). In *Haith*, North Carolina officials argued that they should not be required to submit various changes regarding the election of judges because a letter from the Assistant Attorney General suggested (erroneously) that changes in the State's court system were not subject to section 5. In effect, the State argued that the representation should estop the United States from requiring the State to submit for preclearance changes enacted prior to the court's decision. The panel rejected that argument outright:

[T]he Act does not give this court the power to provide equitable relief to defendants, no matter how just their cause. See, 42 U.S.C. § 1973c [§ 5 of the Voting Rights Act].

By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. *Id.* at 414.

Id. at 834-35. Similarly, in *United States v. Board of Commissioners of Sheffield*, 98 S.Ct. 965 (1978), the Supreme Court was presented with the argument that preclearance of a referendum to determine whether to switch to a mayor-alderman form of government constituted preclearance of the switch itself. The Court rejected this argument:

While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.

Id. at 981.¹⁶ Having concluded that no proper submission was made, the *Sheffield* Court concluded that "the Attorney General did not intend to approve the proposed change to a mayor-council government and could not be understood as having done so." *Id.* at 982.

As we understand it, the Court's decision in *McCain v. Lybrand* sets out the contours of whatever exception to the proper-submission rule may have been suggested by the language in *Sheffield* regarding whether a change was "in fact evaluated."¹⁷ And *McCain*, as noted above,

¹⁶ For purposes of clarity, we note that the first clause of the quoted statement—"the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change"—refers to the explicit provision of § 5 that the Attorney General will be treated as having approved a voting change if the change has been properly submitted and no objection has been interposed by the Attorney General within sixty days after such submission. *Sheffield*, 98 S. Ct. at 981 (quoting 42 U.S.C. § 1973c).

¹⁷ It may actually be that there are no exceptions to the "proper-submission" rule: neither in the parties' briefs nor in our own research do we find any case in which the Supreme Court has

focuses not on whether the Attorney General proceeded in an ideal manner, but on whether the record shows that the Attorney General actually undertook an evaluation of the practical effects of the change at issue and actually found neither the purpose nor the effect proscribed by the statute.

The "preclearance by estoppel" argument fails today (as it did in *Allen*) because it would conflict with the very policies that underlie the § 5 procedure and the Supreme Court's jurisprudence in this area. The Court has repeatedly described the history behind § 5 and the burden it imposes on covered jurisdictions. In *South Carolina v. Katzenbach*, 86 S.Ct. 803 (1966), the Court attributed the enactment of § 5 to the recalcitrance of many jurisdictions in the face of early voting rights litigation: "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," the Court wrote, "Congress might well decide to shift the advantage of time and inertia from the perpetrators of evil to its victims." *Id.* at 818. More recently, the Court has focused specifically on the justifications for requiring formal submissions:

Congress recognized that the Attorney General could not, in addition to these duties [to respond to proper submissions], also monitor and identify each voting change in each jurisdiction subject to § 5. "[B]ecause of the acknowledged and anticipated inability of the Justice Department—given limited resources—to in-

found a preclearance in the absence of a proper submission. We do not reach this ultimate question because we need not decide so much to resolve the case before us today. Today, we need only decide that the City of Monroe has not shown the substantive evaluation of a change that would, as a factual matter, force us to answer the legal question of whether *Sheffield* and *McCain* truly create an exception to the proper-submission rule. See discussion above rejecting the City's "informal preclearance" argument because the City failed to show the requisite substantive evaluation of the change.

vestigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," [McCain,] 465 U.S. at 247, 104 S.Ct. at 1044-45, Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes.

Clark v. Roemer, 111 S.Ct. 2096, 2104 (1991) (rejecting the argument that preclearance of an amended statute necessarily effects a preclearance of all unprecleared changes incorporated in that statute).

The City's "preclearance by estoppel" argument is subject to the same flaw the Supreme Court found in *Clark*: it "upsets th[e proper] ordering of responsibilities under § 5" *Id.* Such a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether." *Id.* The rule the City encourages us to adopt would encourage jurisdictions aware of existing, unprecleared changes not to submit those changes for immediate preclearance, but instead to comb through the files of the Department of Justice looking for evidence that might lead to a "preclearance by estoppel."

Finally, we find no tension between rejection of the City's "preclearance by estoppel" argument and the Supreme Court's decision in *Morris v. Gressette*, 97 S.Ct. 2411 (1977). In *Morris*, the Court held that the Attorney General's failure to interpose an objection within the statutory 60-day period is not subject to judicial review. Thus, as the City points out, a clerical error could bar the Department of Justice from interposing a § 5 objection to a change properly submitted for preclearance (if that error resulted in no objection being timely interposed). However, we cannot agree with the City that an anomaly would exist if the Attorney General could be barred by negligence in the former situation but not by the type of

knowing decision implicated in the present case (i.e., the decision not to send the letter requesting the City to submit the majority vote for preclearance). *Morris* deals with the specific statutory provision that a covered jurisdiction may enforce a change that has been properly submitted if the Attorney General has not interposed an objection within sixty days (as counted under regulations promulgated by the Attorney General). The rule the City proposes would reach well beyond *Morris* and the statute to the very different proposition that the Attorney General could be barred by silence without regard to whether a proper submission has ever been made.

For the foregoing reasons, we conclude that the City's majority vote provision has never been precleared.

VI. THE QUESTION OF LACHES

Before addressing the appropriate remedy, we must address the City's claim that the United States is barred by laches from bringing the instant suit. After reviewing the case law, we are persuaded that the instant government suit cannot be barred by laches.

As other courts have noted, the case law regarding when laches may be invoked against the government is less precise than might be desired. Although there exists an often-quoted principle that "laches is not a defense against the sovereign," *Costello v. United States*, 81 S.Ct. 534, 543 (1961), the precise contours of the rule have been rendered somewhat unclear by various cases allowing laches to be invoked as a defense against the government. We find it unnecessary to attempt any grand synthesis of the existing case law in order to resolve the case before us today; the instant case is readily distinguishable from those cases in which courts have concluded that laches is appropriately invoked against the government.

One line of authority invoked to support the City's argument is a line of cases in which courts have allowed

defendants to raise a laches bar to suits brought by the Equal Employment Opportunity Commission. In *Occidental Life Insurance Co. v. EEOC*, 97 S.Ct. 2447 (1977), a case in which the EEOC brought suit against an employer over three years after the employee first complained to the Commission, the Supreme Court addressed the question of "what time limitation, if any, is imposed on the EEOC's power to bring [a Title VII] suit." *Id.* at 2450. Having rejected the employer's arguments that either federal law or State law created an inflexible time limit on the bringing of lawsuits, the Court wrote:

It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. . . . The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," . . . can also be exercised when the EEOC is the plaintiff.

Id. at 2458. In light of *Occidental Life*, lower courts, including the Eleventh Circuit, have relied on laches as grounds for dismissal of EEOC actions which have been inordinately delayed. See *EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199, 1201-02 (11th cir. 1982) (citing similar holdings in other courts of appeal).¹⁸ Here, the

¹⁸ *Dresser Industries* expressly provides that the application of a laches bar to the EEOC suit before the court "by no means prevents the EEOC from filing a current charge, investigating it, and filing a new lawsuit if, as alleged, discriminatory practices are continuing." *Id.* at 1200 n.2. Because we conclude that laches cannot bar the instant suit because the government here sues to vindicate

City invites us to draw an analogy between an EEOC suit to enforce federal anti-discrimination law and a Department of Justice suit to enforce the preclearance mandate of § 5. For the reasons set out below, we reject that invitation.

To illustrate the difference between the EEOC's position in a typical employment-discrimination suit and the Department of Justice's position in the preclearance suit before us today, a return to first principles is in order. As then-Justice Rehnquist pointed out in dissent in *Occidental Life*,¹⁹ the Supreme Court long ago stated the scope of the laches inquiry as follows:

The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. . . . But this case [a patent controversy] stands upon a different footing, and presents a different question. The question is, are these defenses available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?

United States v. Beebe, 8 S.Ct. 1083, 1086 (1888) (quoted in *Occidental Life*, 97 S.Ct. at 2462 (Rehnquist, J., dissenting)). In the type of discrimination suits we have allowed to be barred by laches, the EEOC allows

its sovereign rights, we need not address the argument that the lack of preclearance could be seen as a "continuing violation" and thus saved from a laches bar.

¹⁹ Justice Rehnquist argued that because an EEOC suit does not "seek[] to vindicate rights belonging to the United States as sovereign," such suits should be subject to State-law statutes of limitation.

its name to be used for the sole benefit of private persons. See *Dresser Industries*, 668 F.2d at 1204 (distinguishing from EEOC suits properly barred by laches any suit brought by the EEOC "to prohibit [the employer] from pursuing a pattern of discrimination that is allegedly occurring [at the time of suit]"); see also *Occidental Life*, 97 S.Ct. at 2458 (focusing specifically on the appropriateness of limiting backpay relief in cases involving an inordinate EEOC delay). Accordingly, in the cases appropriately barred by laches, the EEOC can be described as a "nominal complainant party."

By contrast, in suing to enforce the preclearance procedures of § 5, the United States has a real interest in the litigation and cannot be said to merely allow its name to be used for the "sole benefit of a private person." The statutory provisions assign to the federal government the function of determining whether covered changes have a proscribed purpose or effect before those changes are enforced. In discharging this statutory function, the government is charged with protecting a public interest of the highest significance—the right of all citizens to participate equally in the processes of democratic governance. Cf. *Yick Wo v. Hopkins*, 6 S.Ct. 1064, 1071 (1866) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society . . . [the political franchise] is regarded as a fundamental political right, because preservative of all rights."). In a § 5 suit such as the one before us today, the government seeks to enforce its right to exercise this unique prerogative for the benefit of all of Monroe's citizens, present and future.²⁰ Because

²⁰ We readily conclude, and the City does not argue otherwise, that the unique nature of the preclearance function removes the instant case from the parameters of the Supreme Court's decision in *Clearfield Trust Co. v. United States*, 63 S.Ct. 573 (1943). In *Clearfield Trust*, the Court concluded that the United States was entitled to no special exemption from the rule that lack of prompt

the preclearance function is a paradigm example of the government's functioning in its sovereign capacity, we conclude that the instant case falls well within the core of cases in which the United States is immune from the doctrine of laches.

In support of its argument that laches can constitute a bar to the Attorney General's prevailing in a § 5 suit, the City brings to our attention the decision in *United States v. Georgia*. No. C76-1531A (N.D. Ga. Sept. 30, 1977) (unpublished), *aff'd*, 436 U.S. 941 (1978) (mem.). In *United States v. Georgia*, a three-judge panel rejected a § 5 challenge brought by the Department of Justice regarding two provisions of the Georgia Election Code of 1964. Although it based its holding on a conclusion that there had been an effective preclearance, the panel also wrote:

Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the state of Georgia in an uproar on the eve of a general election.

Several things about *United States v. Georgia* and its precedential effect deserve mention. First, a summary

notice from a drawee of funds on learning of a forgery may bar the drawee's recovery. The Court wrote:

The fact that the drawee is the United States and the laches those of its employees [is] not material. . . . The United States as drawee of commercial paper stands in no different light than any other drawee. . . . 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees

Id. at 576. In exercising the preclearance function, the United States performs a uniquely governmental function; *Clearfield Trust* is thus inapposite.

affirmance by the Supreme Court “affirms only the judgment of the court below, and no more may be read into [the Court’s] action than was essential to sustain that judgment.” *Anderson v. Celebrezze*, 103 S.Ct. 1564, 1568 n.5 (1983). The three-judge panel in *United States v. Georgia* did not hold that laches barred the government’s suit (as the State had abandoned this argument); instead, it ruled in favor of the State on other grounds. Because the laches rationale can hardly be said to have been “essential to sustain the judgment,” we cannot infer Supreme Court approval of the lower court’s statements regarding the Attorney General’s delay. As for the persuasiveness of the decision of the panel itself, we note that the opinion offers no discussion at all regarding how the case before it might be distinguished from the principles discussed above exempting sovereign governmental functions from the operation of laches.

Finally, we note that in *Brooks v. State Board of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989), *aff’d*, 111 S.Ct. 288 (1990) (mem.), a three-judge panel rejected an equitable argument somewhat similar to the one before us today. In *Brooks*, the panel rejected an argument that the laps of time between the enactment of the change and the § 5 challenge to the change justified some kind of “equitable preclearance.” This is somewhat different from Monroe’s argument, which relies on the lapse of time following notice to the Attorney General of an unprecleared change; however, the reasoning of the *Brooks* panel is similar to the rationale that underlies our conclusion today. The panel wrote:

We are mindful of the time that has elapsed since some of the changes were enacted. We cannot, however, “equitably preclear” any of the changes based on equity’s rule of laches. *See McCain*, 465 U.S. at 249-52, 104 S.Ct. at 1046-47; *cf. Haith v. Martin*, 618 F.Supp. 410 (estoppel). Recognizing that the Attorney General could not keep track of changes re-

lating to voting being made, Congress put the burden on the covered jurisdictions to seek preclearance to avoid the very problem we now face. We would do violence to the heart of section 5 if we were to excuse the State’s failure to seek preclearance merely because the State has been disregarding section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. *Allen v. State Board of Elections*, 393 U.S. 544, 571, 89 S.Ct. 817, 834; *United States v. Sheffield Board of Commissioners*, 435 U.S. at 136, 98 S.Ct. at 981; *McCain v. Lybrand*, 465 U.S. at 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

Id. at 1481-82.

For the foregoing reasons, we conclude that laches should not bar the United States in the instant action.

VII. THE APPROPRIATE REMEDY

In the instant case, the United States has requested an order enjoining the defendants from implementing the majority-vote requirement in mayoral elections until defendants obtain preclearance of the change. Our review of the Supreme Court’s case law convinces us that the United States is entitled to the injunctive relief sought.

In *Clark v. Roemer*, 111 S.Ct. 2096, 2101 (1991), the Supreme Court reiterated the general rule: “If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.” The Court carefully distinguished the case before it—involving “the *ex ante* question whether to allow illegal elections to be held”—from a line of cases addressing the “*ex post* question whether to set aside illegal elections.” *Id.* at 2102 (citing cases thus distinguished). The Court wrote:

We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed. No such exigency exists here. The State of Louisiana failed to preclear these judgeships as required by § 5. It received official notice of the defect in July 1987, and yet three years later it had still failed to file for judicial preclearance, the "basic mechanism" for preclearance. . . . The District Court should have enjoined the elections.

Id.

In the instant case, we have concluded that the change to majority voting is a covered change that has not been precleared according to the dictates of § 5. As in *Clark v. Roemer*, we are presented only with the question of *ex ante* injunctive relief.²¹ And, as in *Clark v. Roemer*, we

²¹ For the purposes of clarity, we emphasize that the nature of the relief granted is entirely prospective: nothing we say here today should be understood to undermine the validity of actions taken by officials elected in the City of Monroe prior to this order. As the three-judge panel wrote in *Brooks v. State Board of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989), *aff'd*, 111 S.Ct. 288 (1990) (mem.):

Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. See e.g., *Perkins v. Matthews*, 400 U.S. 379, 441, 91 S.Ct. 431, 441, 27 L.Ed.2d 476 (1971) (question of appropriate remedy for district court); cf., *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183, 105 S.Ct. 1128, 1138, 84 L.Ed.2d 124 (1985) (discretion of district court).

find no "extreme circumstance" that might justify denial of such injunctive relief: the City's mayoral elections are scheduled for November of 1997; the Attorney General objected to the majority-vote requirement in 1991 and filed the instant suit in June of 1994. There is no "eve of the election" problem in this case.

Accordingly, an order will issue providing the injunctive relief requested.

Thus, we must exercise our discretion in fashioning the appropriate remedy for the case at hand.

As we discussed above, a three-judge court cannot rule that the covered changes have been "equitably precleared." At the other extreme, we are not required to rule . . . that the covered changes are void *ab initio*, retroactively rendering void any actions taken by a[n official] whose position is the result of a covered change that was not precleared. Granting such a remedy would . . . create genuine chaos.

Id. at 1482.

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APPENDIX B

[Filed April 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 94-45-ATH (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of
the City of Monroe; MONROE CITY COUNCIL; RANDY
PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J.
ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE
ADCOCK, Members of the Monroe City Council; SARA
CAMPBELL, City Clerk,

Defendants.

ORDER

This matter is before the Court on the motion of the United States for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure. Upon consideration of the motion, the memorandum and documents filed in support of that motion, and for the reasons set out in the Memorandum Opinion, it is this 15th day of April, 1997, hereby ORDERED that

The United States' motion for summary judgment is GRANTED.

It is FURTHER ORDERED that the defendants are permanently enjoined from further implementing the majority vote requirement in mayoral elections unless and

39a

until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is obtained.

/s/ R. Lanier Anderson
United States Circuit Judge

/s/ Duross Fitzpatrick
United States District Judge

/s/ Wilbur D. Owens, Jr.
United States District Judge

APPENDIX C

[Filed April 21, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Case No. 3:94-CV-45 (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of
the City of Monroe; MONROE CITY COUNCIL; RANDY
PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J.
ENSLEN, ROSEMARY B. MATHEWS and LARRY WAYNE
ADCOCK, Members of the Monroe City Council;
SARA CAMPBELL, City Clerk

Defendant.

JUDGMENT

The Court by Order dated and filed April 15, 1997,
having granted Plaintiff's Motion for Summary Judgment.

JUDGMENT is hereby entered in favor of Plaintiff,
UNITED STATES OF AMERICA and against Defend-
ants, CITY OF MONROE, GEORGIA; HARRY
KNIGHT, mayor of the City of Monroe; MONROE CITY
COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH
BOLTON, PHILLIP J. ENSLEN, ROSEMARY B.
MATHEWS, and LARRY WAYNE ADCOCK, Members
of the Monroe City Council; SARA CAMPBELL, City
Clerk.

Defendants are permanently enjoined from further im-
plementing the majority vote requirement in Mayoral elec-
tions unless and until preclearance under Section 5 of the
Voting Rights Act of 1965, as amended, 42 U.S.C.
§ 1937c, is obtained.

JUDGMENT ENTERED this 21st day of April, 1997.

GREGORY J. LEONARD
Clerk

By /s/ Zadie Peters
ZADIE PETERS
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action Nos.: 3:94-CV-45 (WDO)
and 94-45-ATH (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of
the City of Monroe; MONROE CITY COUNCIL; RANDY
PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J.
ENSLIN, ROSEMARY B. MATHEWS, and LARRY WAYNE
ADOCK, Members of the Monroe City Council in their
official capacities, SARA CAMPBELL, City Clerk,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendants City of Monroe, Georgia; Harry Knight, Mayor of the City of Monroe; Monroe City Council; Randy Peppers, Jerry Smith, Hugh Bolton, Phillip J. Enslin, Rosemary B. Mathews, and Larry Wayne Adcock, members of the Monroe City Council; and Sara Campbell, City Clerk in the above case, hereby jointly appeal to the Supreme Court of the United States from the final Order and Judgment of the three judge panel (R. Lanier Anderson, Circuit Judge; Duross Fitzpatrick, Chief Judge; and Wilbur D. Owens, Jr., District Judge) in *United States of America vs. City of Monroe, et al.*, 3:94-CV-45 (WDO), Middle District of Georgia (April 21, 1997) granting injunctive relief to the

United States of America under § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973(c)), he referenced Order was filed on April 15, 1997 and the Judgment was entered on April 21, 1997, in the United States District Court for the Middle District of Georgia. This appeal is filed pursuant to and in accordance with 28 U.S.C. § 1253, 42 U.S.C. § 1973(c), and Rule 18 of the Rules of The Supreme Court of the United States.

This 21st day of May, 1997.

/s/ Upshaw C. Bentley, Jr.
UPSHAW C. BENTLEY, JR.
Georgia State Bar No.: 053000
J. EDWARD ALLEN
Georgia State Bar No.: 010950
MICHAEL C. DANIEL
Georgia State Bar No.: 204237
RICHARD L. FORD
Georgia State Bar No.: 268178
Attorneys for Defendants
FORTSON, BENTLEY & GRIFFIN, P.A.
P.O. Box 1744
Athens, Georgia 30603-1744
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APPENDIX E

STATUTORY PROVISIONS

42 U.S.C. § 1973.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force

or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the rights on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure

to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPENDIX F

[Filed July 29, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 75-67-ATH

ROBERT HOWARD, GRADY CROWLEY, *et al.*, on behalf of
themselves and all others similarly situated,
Plaintiffs,

-v-

BOARD OF COMMISSIONERS OF WALTON COUNTY,
GEORGIA, *et al.*,
Defendants.

OWENS, District Judge:

Before the court are the tasks of (1) resolving certain issues ancillary to the injunction granted by a three-judge court pursuant to section five of the Voting Rights Act, 42 U.S.C.A. § 1973c, against enforcement of several state laws governing elections in Walton County and the City of Monroe and (2) implementing interim election procedures until the challenged laws become effective upon compliance with section five or until further legislation is enacted for which approval required by section five is obtained.

THE BOARD OF COMMISSIONERS

Because [1970] Ga. Laws 2475 never became effective, the prior law which it purported to modify remains unchanged. *See Pitts v. Busbee*, 511 F.2d 126 (5th Cir. 1975). Thus, elections for the Walton County Board of

Commissioners are governed by [1939] Ga. Laws 765. That statute divides Walton County into four quadrants and provides for the election of one commissioner from each district so established, together with a commission chairman elected by the voters of the entire county. The four year terms of all members expire simultaneously.

The districts as they exist under the 1939 law do not meet the constitutional standard of substantial population equality, *e.g.*, *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1967); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1459, 12 L.Ed.2d 506 (1974), and therefore the district lines must be redrawn. After carefully examining the evidence submitted by the plaintiffs and the Board of Commissioners, the court has determined that the plaintiffs' Plan P-1 is the most appropriate and that the districts for the election of four commissioners shall hereafter be as shown on the attached map of Walton County, Exhibit "A".

THE BOARD OF EDUCATION

With [1969] Ga. Laws 2054 rendered ineffective by said three-judge injunction, the applicable law governing the election of members of the Board of Education is found in [1968] Ga. Laws 2974. That law provides for the election of three members by voters residing in the City of Monroe and for the election of one member from each of four districts outside the city by the voters in each district. Members for posts 1, 3, 5, and 7 are elected in presidential election years; members for posts 2, 4, and 6 are elected in the intervening even year.

Under the 1968 districting scheme, 8,071 city voters are represented by three members of the Board, while the 13,372 voters in the remainder of the county, excluding one municipality with an independent school district, are represented by four members; there is thus presently one representative for each 2,690 city voters and one repre-

sentative for each 3,343 county voters. With an ideal ratio of one representative for each 3,063 voters, there results a deviation from the ideal in the city of minus 12.2 percent and in the county of plus 9.1 percent. This total population deviation of 22.3 percent does not meet the "one man, one vote" standard of population equality. *See Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

This deviation cannot be cured without completely departing from the existing scheme.

Recognizing the necessity of devising an entirely new scheme to correct this population deviation, both the plaintiffs and the defendant Board of Education have submitted plans creating seven single-member election districts. After giving careful consideration to the submitted plans the court is of the opinion that the plaintiff's proposed plan is the better of the plans and does correct the deviation so as to satisfy the "one-man, one vote" rule. Members of the Board of Education shall be elected from seven single-member districts as shown on Exhibit "B". Candidates must reside in the district they seek to represent and only voters residing in each district shall elect the member from the district. As hereinafter stated all present members must stand for election this year. So as to conform to the terms of the present members, those elected this year from districts 1, 3, 5, and 7 will hold office from noon, January 2, 1977, for four years and the remainder from districts 2, 4, and 6 will hold office from the same date for two years and as to all until their successors are duly elected and qualified.

THE CITY OF MONROE

Because the City of Monroe in an unchallenged law conducts its election by an at-large system, [1964] Ga. Laws 205b, no redistricting or other remedy is required

as a result of the injunction against enforcement of the annexation ordinances increasing the population of the city. The issue concerning the city is whether a majority or plurality vote is required for the election of mayor and councilmen.

The 1971 city charter, [1971] Ga. Laws 3221, 3227, and an amendment to the predecessor charter, [1966] Ga. Laws 2458, provided for the election of the mayor and council by a majority vote. Both of these statutes having been declared unenforceable under section five, the remaining city charter is silent as to whether a plurality or majority vote is required. The parties agree that the city conducted plurality elections until enactment of [1966] Ga. Laws 2458.

Georgia's Municipal Election Code, Ga. Code Ann. § 34A-1407(a), provides:

"If the municipal charter or ordinance as now existing or as amended subsequent to the effective date of this subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office."

Since neither the charter nor an ordinance of the City of Monroe now or ever has provided for a plurality election, this general law, which the parties have informed the court was approved by the Attorney General of the United States as required by section five, clearly applies here and requires election by majority vote. Plaintiffs' argument that the Monroe city charter must have provided for election by plurality vote because the city conducted elections on a plurality basis prior to the 1966 law is not persuasive. Such an interpretation would make a nullity of this gen-

eral statute and void its obvious purpose of establishing an unambiguous rule for municipalities with charters lacking an express requirement.

INTERIM ELECTION PLAN

The persons presently serving as members of the Board of Commissioners and the Board of Education who were elected under unconstitutional schemes, are, of course, only *de facto* in office and under the equitable decree of this court are to remain so only until succeeded by officials elected pursuant to the plans and schemes herein created. *Paige v. Gray*, 399 F.Supp. 459 (M.D. Ga. 1975), *appeal docketed*, No. 75-3314, 5th Cir., August 28, 1975; *Tarpley v. Carr*, 204 Ga. 721, 51 S.E. 2d 638 (1949). Thus the present members of the Board of Commissioners, [1939] Ga. Laws 765, and of the Board of Education, [1968] Ga. Laws 2974, shall hold office until noon January 2, 1977, at which time they shall vacate and surrender their respective offices to their successors duly elected pursuant to the order of this court and the laws of Georgia not inconsistent with the orders in this case and properly qualified. Until that time, they possess and have the duty and responsibility of exercising all of the powers given them by state law not inconsistent with the orders in this case.

The procedures herein specified shall remain in effect until such time as different ones shall be prescribed by state law, duly enacted and submitted pursuant to the Voting Rights Act.

Primary elections for county commissioners and some members of the Board of Education are now scheduled to be held on August 10, 1976. The persons who are now running for those offices qualified pursuant to the schemes which this order now declares to each be unconstitutional. This order necessitates the election of all county commissioners and all members of the Board of Educa-

tion. For those elections to be conducted pursuant to the manner contemplated by the laws of this state, there must be a new qualifying period and another primary election, all of which because of the legally required time schedule must be conducted in addition to and after the now scheduled August 10, 1976, election. The court is preparing to fashion an order for a primary election and a run-off election, if required. Before doing so the court desires to receive the suggestions of the parties as to a time schedule for qualifying of candidates, conducting a primary election and holding a run-off primary election, if required. In submitting their suggestion the parties should bear in mind that the court intends to fashion a time schedule that will not interfere with the holding of the general election now scheduled for November 2, 1976. Let those suggestions be submitted within ten (10) days. *See* Page v. Gray, *supra*, at 466-68. In the meantime county commissioners and members of the Board of Education may not be elected on August 10, 1976.

SO ORDERED, this the 29th day of July 1976.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

do not desire to run in the delayed primary are entitled to a refund of their qualifying fee and those who do desire to run are entitled to be credited with the amount previously paid.

Persons eligible to vote in these delayed primary elections shall be those persons who are eligible to vote in the regular August 10, 1976, election.

Those person nominated in the delayed primary elections shall be candidates in the general election of November 2, 1976.

In all other respects the delayed primary elections shall be conducted in accordance with the laws of Georgia.

SO ORDERED, this the 5th day of August 1976.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

APPENDIX G

GEORGIA LEGAL SERVICES PROGRAMS

CENTRAL OFFICE

Suite 2121 • 101 Marietta Towers

Atlanta, Georgia 30303

(404) 656-6021

Gist 221-6021

August 12, 1976

John L. Crowmartie, Jr.

Executive Director

Wayne M. Phessel

David F. Walbert

Charles M. Baird

W. David Arnold

Mr. Gerald Jones

Civil Rights Division

Department of Justice

Washington, D.C.

Sam S. Harden, Jr.

President—GILS

J. Ben Shapiro, Jr.

President—GLSP

Dear Gerry:

I am sending you a copy of a recent Order in a Section V case here in Georgia, along with the Plaintiff's Brief. I have been talking to Dave Hunter about this issue, one of general importance to most of the municipalities in the State, and he suggested that I get in contact with you to get your opinion.

The problem involves those municipalities in Georgia whose charters did not expressly provide for either majority or plurality voting on November 1, 1964. A general State Act was passed in 1968 providing that municipalities would conduct their elections by majority vote unless their charters "provided for" the contrary. That Act was approved under Section V and is codified at Ga. Code Ann. Sec. 34A-1407(a). The problem involves those municipalities which had always used, as a matter of practice,

plurality voting prior to November 1, 1964, even though their charter was silent. We tried to argue in this case that, for a number of reasons, those charters should be construed to have "provided for" plurality elections on the November 1, 1964 date. Both for that state law reason and for Section V reasons, we then argued that such municipalities would have individual Section V approval before they could implement majority voting. The full explanation of our arguments is set out in the enclosed Brief, pages 3-4, and 9-13. In a ruling on July 29, 1976, which is enclosed, the Court rejected our arguments and held that the issue in such cities was controlled by the general state law from 1968 which had Justice approval. We are presently debating an appeal based on the same issues we briefly outlined in the trial court. They are a combined mix of state law and Section V law. I strongly question our chances of success on appeal. And even if we won on purely state law grounds, it would seem to me that the State Supreme Court could construe the state law differently and ignore the Fifth Circuit.

My question to you is whether the Department of Justice would have an interest in this case. If the Department, as the enforcer of Section V, agreed with our positions and would see fit to intervene in the case, our chances would be vastly improved in my opinion. Moreover, if you are in a position to make the kind of argument you are now raising with respect to the majority vote requirement for *county* elections, the entire case would be in a wholly different posture. That argument, however, would probably require refiling of a new case in the district court since we did not raise it.

I have already talked with Ms. Anita Kaake who provided valuable assistance. She did not feel, however, that we could raise the same kind of objections to the earlier Section V approval of this statute that are now being raised with respect to the county majority vote provision. After reading the Department's recent letter setting out your reasoning on that issue, I wondered if some of it

might still not be applicable to this situation. I could not determine that, of course, since I have not seen the correspondence between the State and the Department of Justice as to the 1968 City law.

In any event, I would appreciate hearing your opinion on the Department's position with respect to these various possible legal arguments on the municipal majority vote requirement. If there is a decision to appeal in this case, with Department of Justice assistance, we would of course have to know that very soon. Thus, I would appreciate your earliest reply.

Thank you for your consideration, and I will be looking forward to hearing from you.

Very truly yours,

/s/ David F. Walbert
DAVID W. WALBERT

DFW/bp

2

Supreme Court, U.S.

FILED

AUG 18 1997

No. 97-122

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF MONROE, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO AFFIRM

WALTER DELLINGER

Acting Solicitor General

ISABELLE KATZ PINZLER

*Acting Assistant Attorney
General*

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Washington, D.C. 20530-0001

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36 PP

QUESTION PRESENTED

Whether the three-judge district court properly enjoined the City of Monroe, a jurisdiction subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, from implementing an unprecleared voting requirement instituted after the coverage date of Section 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-122

CITY OF MONROE, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA*

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-37a) is reported at 962 F. Supp. 1501.

JURISDICTION

The order of the three-judge district court granting summary judgment for the United States and entering a permanent injunction against appellants was filed on April 15, 1997 (J.S. App. 38a-39a), and judgment was entered on April 21, 1997 (J.S. App. 40a-41a). A notice of appeal was filed on May 21, 1997 (J.S. App. 42a-43a), and the jurisdictional statement was filed on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (reproduced at J.S. App. 44a-46a). Contrary to the appellants' assertion (J.S. 2), this appeal does not involve Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

STATEMENT

The appeal taken by the City of Monroe, Georgia, et al. (the City) is from the order of the three-judge district court in *United States v. City of Monroe*, No. 94-45-ATH (M.D. Ga.), permanently enjoining the City "from further implementing the majority vote requirement in mayoral elections unless and until preclearance * * * is obtained" under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (J.S. App. 38a-39a). Notwithstanding the City's focus in its factual statement (J.S. 3-5) on the details of negotiations with the United States which ultimately led to preclearance of its use of single-member districts and majority voting in city council elections, the pertinent facts for purposes of this appeal are those relating to the City's adoption and implementation of an unprecleared majority vote requirement for its mayoral elections. The district court explicitly "f[ou]nd the parties in agreement as to the facts material to this litigation" (J.S. App. 3a n.1), as set forth in the court's opinion (*id.* at 3a-12a) and below.

1. The State of Georgia and its subdivisions, including the City of Monroe, are subject to the preclearance requirements of Section 5.¹ As of November 1, 1964, the coverage date for Section 5, candidates for nomination or election to the mayor's office in the City of Monroe prevailed if they received a plurality

¹ The text of Section 5 is reprinted at J.S. App. 44a-46a.

of the votes cast. The city charter in effect at that time did not specify whether majority or plurality voting applied, but set forth only a single election date, the first Thursday in December, and did not provide for a run-off election. J.S. App. 3a.

On February 28, 1966, the State of Georgia enacted local legislation, Act 150 (H.B. 230), 1966 Ga. Laws 2457, amending the charter of the City of Monroe. The 1966 charter amendment imposed a majority vote requirement for elections to the mayor's office,² and provided for a run-off election if no candidate received a majority in the December municipal elections. The City did not submit Act 150 to the Attorney General for Section 5 review or seek a declaratory judgment from the United States District Court for the District of Columbia declaring that the majority vote requirement for the City of Monroe has neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. J.S. App. 3a. Thus, although the City changed its election procedure pursuant to Act 150 to include a majority vote requirement, this change was never precleared and therefore was legally unenforceable.

On April 4, 1968, the State of Georgia enacted Act 998 (S.B. 151), 1968 Ga. Laws 885, known as the 1968 Municipal Election Code (1968 Code). Prior to enactment of the 1968 Code, the State did not have a comprehensive municipal election code; instead, each municipality's charter governed the conduct of its own elections, including specifying whether elections were to be determined by majority or plurality vote.

² The majority vote requirements referred to throughout this memorandum also apply to city council elections. This appeal, however, relates only to the use of majority voting in mayoral elections.

Section 34A-1407(a) of the 1968 Code (recodified without substantive change at Ga. Code Ann. § 21-3-407 (Michie Supp. 1997)) provided:

If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

Thus, the 1968 Code continued the past practice of deferring to local election law, requiring a majority vote in municipal elections *unless* a city's charter or ordinance affirmatively provides for a plurality vote or is subsequently amended to provide for a plurality vote. The City of Monroe did not take any action or change any election practice or procedure pursuant to the 1968 Code.

On May 13, 1968, the State of Georgia submitted the 1968 Code to the Attorney General for Section 5 review. The State's submission did not specify which municipalities would be required to change from a plurality vote requirement to a majority vote requirement, and did not request preclearance for each such municipality.³ Instead, the State stated in its submission that "[w]hether the majority or plurality rule is in effect in [any] municipal election will depend upon how the municipality's charter is written at present

³ According to the 1990 Census, there are 535 municipalities in Georgia.

or may be written in [the] future," and that, "[i]n view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the [1968] Municipal Election Code." See J.S. App. 4a, 5a.

On July 11, 1968, the Assistant Attorney General for Civil Rights (AAG), on behalf of the Attorney General, interposed an objection to certain provisions of the 1968 Code. No objection was interposed to the change occasioned by Section 34A-1407(a) of the Code, as submitted by the State. J.S. App. 5a.

On April 8, 1971, the State of Georgia enacted local legislation, Act 546 (H.B. 793), 1971 Ga. Laws 3221, reincorporating and amending the City of Monroe's charter. The 1971 charter amendments again required that candidates for the mayor's office in Monroe receive a majority of the votes cast to be elected. The City did not submit Act 546 to the Attorney General for Section 5 review or seek a Section 5 declaratory judgment from the United States District Court for the District of Columbia. J.S. App. 5a.

In 1976, two black citizens of Monroe brought a Section 5 suit against Walton County, Georgia, and the City of Monroe. *Howard v. Board of Commissioners of Walton County*, No. 75-67-ATH (M.D. Ga.). The suit challenged, *inter alia*, the City's failure to obtain preclearance of its majority vote requirement and of three annexation ordinances. On July 29, 1976, the three-judge court in *Howard* enjoined enforcement of the ordinances effecting the annexations, and also enjoined enforcement of those portions of the City's 1966 and 1971 charters providing for election of the mayor and the city council by majority vote. J.S. App. 5a-6a.

The three-judge court ruled that the majority vote requirement imposed by the 1966 and 1971 amendments to the city charter was unenforceable because it had not received preclearance under Section 5. However, the court remanded the case to the originating judge on the issue of whether the majority vote provision of the 1968 Code, which "according to the parties has been approved by the Attorney General" (see J.S. App. 6a) in accordance with Section 5, applied to the City of Monroe. On the same day, the originating judge ruled that this provision of the 1968 Code—which he, too, noted had received Section 5 preclearance—applied to the City of Monroe and required election by majority vote (J.S. App. 50a).

On August 12, 1976, two weeks after the decisions in *Howard*, the City of Monroe submitted to the Attorney General the three annexation ordinances that the three-judge court had determined required Section 5 preclearance. It is undisputed that the City's submission did *not* include any request for preclearance of its adoption of a majority vote requirement for mayoral and city council elections. On October 13, 1976, the Attorney General interposed an objection to two of the annexations submitted by the City. However, the Attorney General subsequently agreed to reconsider this objection, requesting additional evidence from the City before reviewing the entire record as completed on September 29, 1977. On November 25, 1977, the Attorney General withdrew his objection to the two annexations. The withdrawal of this objection was based not on any determination as to the effect of majority voting, but rather on new information supporting a determination that the

effect of the annexations on the City's black population percentage would be *de minimis*. J.S. App. 8a-10a.⁴

On March 20, 1990, the State of Georgia enacted local legislation, Act 858 (H.B. 1972), 1990 Ga. Laws 4163, again amending the City of Monroe's charter. The 1990 charter amendment reiterated the requirement in the 1966 and 1971 amendments that candidates for the mayor's office in Monroe receive a majority of the votes cast to gain election. J.S. App. 11a.

On September 26, 1990, the City of Monroe submitted Act 858 to the Department of Justice for Section 5 preclearance. In the process of reviewing Act 858, the Department determined that the City had failed to submit for preclearance earlier voting changes directly related to the submission—among them the voting changes included in Act 150 (1966) and Act 546 (1971)—and so informed the City. On November 19, 1990, the City submitted Acts 150 and 546 for Section 5 preclearance. On July 3, 1991, the AAG, on behalf of the Attorney General, interposed a timely objection under Section 5 to the change from a plurality vote requirement to a majority vote requirement for the City of Monroe. In August 1991, and again in August 1993, the City of Monroe requested that the AAG reconsider his objection to its change to a majority

⁴ The Attorney General's withdrawal letter (Exhibit 6 to Defendant's Brief in Support of Motion for Summary Judgment) stated:

A review of the entire record reveals that the dilution of the black population caused by these annexations was approximately one half percent and that this small degree of dilution, in the demographic and electoral context of the City of Monroe, will have no discernible racially discriminatory electoral effect.

vote requirement. On both occasions, the AAG declined to withdraw his objection,⁵ and promptly notified the City of this decision. J.S. App. 11a.

For approximately three years after the AAG interposed his objection, the United States made efforts to convince the City to comply voluntarily with the Voting Rights Act. In addition, before filing suit against the City, the United States attempted to resolve this matter through negotiation of a consent decree. All such efforts were unsuccessful. The City has thus continuously implemented its unprecleared majority vote requirement for nomination and election to the mayor's office in all of its mayoral elections from 1966 to the present.

On June 3, 1994, the United States filed this civil action against the City of Monroe and its mayor, city council, council members, and city clerk (collectively, the City), alleging, *inter alia*, that the City's use of a majority vote requirement in its mayoral elections violates Section 5 of the Voting Rights Act. J.S. App. 11a.⁶ On August 9, 1996, a three-judge court heard

⁵ Since the July 1968 preclearance of the majority vote provision of the State of Georgia's 1968 Municipal Election Code, the Attorney General (or the AAG, acting on the Attorney General's behalf) has interposed Section 5 objections to changes from a plurality vote requirement to a majority vote requirement in more than 20 other Georgia municipalities.

⁶ The complaint also alleged that the City's use of the majority vote requirement in its at-large city council elections violated Section 5, and that the use of both majority vote and at-large elections for city council members violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. However, during the course of this litigation, the United States and the City of Monroe entered into a settlement agreement resolving all issues relating to the City's method of electing council members. While we disagree with the City's

oral argument on the parties' cross-motions for summary judgment on the Section 5 claim. The three-judge court determined that summary judgment on this claim would be appropriate because "the parties do not dispute the facts material to this litigation, but only the legal significance of those facts" (*id.* at 12a).

2. On April 15, 1997, the three-judge court granted the United States' motion for summary judgment, holding that the City's adoption of a majority vote requirement "is a covered change that has not been precleared according to the dictates of [Section] 5" (J.S. App. 36a). In a comprehensive opinion (see *id.* at 1a-37a) explicitly rejecting many of the arguments the City reiterates before this Court, the three-judge court held that (1) the United States' Section 5 claim is not barred by any preclusive effect of the earlier decisions in the *Howard* litigation (*id.* at 12a-18a); (2) the City's shift from a plurality voting scheme to a majority vote requirement in 1966 was a change covered by Section 5 (*id.* at 18a); (3) this change was not precleared as a result of the Attorney General's

characterization of the negotiations which ultimately led to that settlement, the subject matter of the settlement is not before this Court in this appeal, and thus we note only that the discussion of those negotiations (J.S. 4-5) is totally irrelevant to the questions presented here. We also dispute the accuracy of the City's assertion that, after the settlement, "the sole remaining issue in the lawsuit was whether the City of Monroe was required to submit the majority vote method of electing the Mayor for Section 5 preclearance" (J.S. 2). While this was the sole issue before the three-judge court on the parties' cross-motions for summary judgment, and is thus the sole issue now before this Court, the complaint we filed also alleged that the City's use of a majority vote requirement in mayoral elections violates Section 2. This claim has not yet been addressed by the district court, and thus, likewise, is not before this Court in this appeal.

failure to interpose an objection to the statewide majority vote provision, Section 34A-1407(a) of the 1968 Municipal Election Code, upon the State's submission of the Code for Section 5 review (*id.* at 18a-22a); (4) the change was not precleared as a result of any action or inaction of the Attorney General in connection with either the *Howard* litigation or the City's Section 5 submission of the annexations at issue in *Howard* (*id.* at 22a-29a); (5) the government's suit is not barred by laches (*id.* at 29a-35a); and (6) the United States "is entitled to the injunctive relief sought" (*id.* at 35a) as an appropriate remedy for the Section 5 violation it established—that is, to prospective relief in the form of an order permanently enjoining the City from implementing its majority vote requirement in mayoral elections unless and until it has obtained preclearance of this change (*id.* at 35a-37a).

The three-judge court's order granting summary judgment for the United States and entering such an injunction against the City was filed on April 15, 1997 (J.S. App. 38a-39a), and judgment was entered on April 21, 1997 (*id.* at 40a-41a). The City filed a timely notice of appeal on May 21, 1997 (*id.* at 42a-43a). Applications for a stay of the injunction pending appeal were denied by the three-judge court on June 27, 1997. On August 6, 1997, the Court granted the City's motion for a stay pending action by the Court on the statement as to jurisdiction.

ARGUMENT

None of the four "questions presented" in the Jurisdictional Statement filed by the City of Monroe (see J.S. i) presents an issue warranting this Court's plenary review, nor has any error been cited that might warrant a reversal of the decision of the three-

judge district court on the merits. The sole issue on appeal here is whether the City has complied with the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, with respect to the adoption of a majority vote requirement for its mayoral elections. The district court's determination that preclearance of this covered voting change was *never* obtained is based on an analysis consistent with the governing precedents of this Court, and should therefore be affirmed.

I. THE CITY OF MONROE'S ADOPTION OF A MAJORITY VOTE REQUIREMENT HAS NOT BEEN PRECLEARED IN ACCORDANCE WITH SECTION 5 OF THE VOTING RIGHTS ACT

A. Preclearance Of The Majority Vote Provision Of The State Of Georgia's 1968 Municipal Election Code Did Not Constitute Preclearance Of The City Of Monroe's Adoption Of A Majority Vote Requirement

The three-judge court correctly held that Section 5 preclearance of the majority vote provision incorporated in the State of Georgia's 1968 Municipal Election Code did not also preclear the prior or subsequent adoption and implementation of a majority vote requirement by any particular municipality within the State (see J.S. App. 18a-22a). This Court's decision in *City of Rome v. United States*, 446 U.S. 156 (1980), a Section 5 declaratory judgment action involving application of the same statewide provision to another Georgia municipality under circumstances strikingly similar to those now before the Court, directly supports the decision of the district court here. The City's proposal that this Court take advantage of the supposedly more "thorough record" developed in

the summary judgment proceedings here (J.S. 16) to revisit the issue presented in *City of Rome* should be rejected.

1. This Court's decision in *City of Rome* fully supports the district court's decision here

In *City of Rome*, the Court upheld a three-judge court's decision that the municipality's change to a majority vote requirement, initially made by charter amendment in 1966 and continuously implemented thereafter (just as it was in the City of Monroe), had not been precleared in accordance with Section 5. See *City of Rome v. United States*, 472 F. Supp. 221 (D.D.C. 1979) (three-judge court). The three-judge court in *Rome*, relying on this Court's earlier decisions in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), stated (472 F. Supp. at 233):

Rome argues that its Charter, having been amended in 1966 to provide for majority voting, did not provide for plurality voting in 1968, and that therefore the 1968 Code mandated majority voting and runoff elections. * * * Therefore, in Rome's view, the granting of preclearance to the 1968 Code constituted preclearance to the majority vote, numbered post and runoff election provisions of the City Charter.

* * * * *

We think *Allen* and *Sheffield* compel rejection of the City's theory. Georgia, in our view, submitted to the Attorney General only its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and num-

bered posts, and, possibly, its expression of a general policy in favor of majority voting. It did not, however, submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues.

On appeal, this Court affirmed the judgment of the three-judge court, stating (446 U.S. at 169 n.6 (emphasis added)):

We * * * reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for * * * consideration pursuant to the Act" [quoting *Allen*, 393 U.S. at 571], and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction [citing *Sheffield*, 435 U.S. at 137-138]. Under this standard, *the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes.*

Under this Court's precedents in *Allen*, *Sheffield*, and *City of Rome*, it is clear that jurisdictions subject to Section 5 must request preclearance of a cov-

ered voting change in an "unambiguous and recordable manner" (*Allen*, 393 U.S. at 571), and that the Attorney General will not be deemed to have precleared any voting change not submitted in such a manner. Moreover, in *City of Rome*, the Court explicitly held that the State of Georgia's Section 5 submission of its 1968 Municipal Election Code—the very same submission on which the City of Monroe now relies—"cannot be viewed as a submission of the [City of Rome's] 1966 electoral changes" (446 U.S. at 169 n.6).⁷

The correctness of that holding is underscored by the fact that, because Rome's city charter had been amended in 1966 to include a majority vote requirement, it would have appeared that implementation of the statewide provision would have effected no covered change to review with respect to that city. The same is true of the City of Monroe; indeed, there is no logical basis on which a different result from that obtained in *City of Rome* could be justified with respect to identical electoral changes (including the adoption of a majority vote requirement) made in the identical manner (through a 1966 charter amendment) by the City of Monroe. Thus, there is no reason for this Court to revisit in this case the essentially identical preclearance issue decided against the City of Rome. This Court's precedents make it clear that the Attorney General cannot be deemed to have precleared a city's unsubmitted charter amendment simply by

⁷ Although the City suggests (J.S. 16) that the majority vote preclearance issue was not "directly litigated * * * as a primary issue" in *City of Rome*, the issue was explicitly decided by the district court, was included in the questions presented to this Court, was fully briefed for the Court, and was addressed on its merits by the Court.

virtue of having precleared a State's "decision to defer" to such charters (*City of Rome*, 472 F. Supp. at 233). Accordingly, the three-judge court here correctly held that preclearance of the statewide majority vote provision incorporated in Georgia's 1968 Code did not also preclear the adoption and implementation of a majority vote requirement by the City of Monroe.

2. *The originating judge's decision in Howard v. Board of Commissioners of Walton County has no preclusive effect in this case*

In *Howard v. Board of Commissioners of Walton County*, No. 75-67-ATH (M.D. Ga. July 29, 1976), a three-judge court ruled that the majority vote requirement imposed by the 1966 and 1971 amendments to the City of Monroe's charter was unenforceable because it had not received Section 5 preclearance. However, the originating judge was directed on remand to consider the application to the City of Monroe of Section 34A-1407(a) of Georgia's 1968 Municipal Election Code. As discussed earlier, Section 34A-1407(a) provides for the use of majority voting in all municipal elections statewide, *unless* a "municipal charter or ordinance, as now existing or as amended subsequent[ly], provides that a candidate may be nominated or elected by a plurality."

Although it was undisputed that the City had conducted all elections by plurality vote prior to the 1966 and 1971 charter amendments providing for majority vote elections, the originating judge found (J.S. App. 50a):

Both of these statutes having been declared unenforceable under [Section 5], the remaining charter is silent as to whether a plurality or majority vote is required. * * * Since neither the charter

nor an ordinance of the City of Monroe now or ever has provided for a plurality election, [Section 34A.1407(a)], which the parties have informed the court was approved by the Attorney General of the United States as required by [Section 5], clearly applies here and requires election by majority vote.

The three-judge court here properly rejected the City's contention that this suit is barred by any preclusive effect of the *Howard* decision (see J.S. App. 12a-17a). Indeed, we question whether the originating judge's opinion—which held only that the statewide provision *applied* to the City—can properly be read as deciding that the Attorney General's preclearance of Section 34A-1407(a) also precleared the City's adoption of majority voting pursuant to that provision.

Even if we assume that the court did purport to so hold, it is well-settled that the “related doctrines” of collateral estoppel and res judicata bar reconsideration of a matter “distinctly put in issue and directly determined by a court of competent jurisdiction” only in subsequent litigation “between the same parties or their privies.” *Montana v. United States*, 440 U.S. 147, 153 (1979), quoting *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48 (1897). Recognizing the United States' enforcement of federal law as a matter of public interest independent of the individual concerns of private citizens, as well as the tremendous burden the United States would face if forced to monitor private litigation for possible mishandling of Section 5 claims (see J.S. App. 14a), the district court here found “an insufficient identity of parties to invoke issue or claim preclusion” against the United States (*id.* at 12a). There was much upon which to base this conclusion: the United States was not a

party to the *Howard* litigation, was not in privity with the *Howard* plaintiffs, and did not participate in any other manner at any stage of the *Howard* proceedings. This Court has given “controlling” weight to the “nonparticipation of the United States and the Attorney General” in rejecting estoppel arguments under similar circumstances. See *City of Richmond v. United States*, 422 U.S. 358, 374 n.6 (1975).

In addition, this Court has explicitly rejected the argument that a judgment may be given preclusive effect against a non-party who had actual knowledge of the prior litigation, and an opportunity to intervene in that lawsuit, absent actual intervention. See *Martin v. Wilks*, 490 U.S. 755, 765 (1989). As more fully discussed below, the United States certainly cannot, as the City suggests, be deemed either to have acquiesced in the outcome of the *Howard* case (see J.S. 17) or to have precleared an unsubmitted change (see J.S. 10) by virtue of its failure to intervene.

Indeed, where there has been no government participation in an earlier case resolving a critical Section 5 issue, the Court has been particularly reluctant to accord preclusive effect to that judgment. In *City of Richmond*, a Section 5 declaratory judgment action seeking preclearance of a municipal annexation, the Court rejected the argument that the effect of the annexation was to deny or abridge the right to vote of Richmond's black community (422 U.S. at 370-372), but remanded “for further proceedings with respect to purpose alone” (*id.* at 378), holding that an annexation motivated by a discriminatory purpose is prohibited by Section 5 “whatever its actual effect * * * may be” (*id.* at 379). The Court expressly held that the Attorney General was not foreclosed from raising the issue of discriminatory purpose, even though that issue had already been raised in private

litigation challenging the same annexation and resolved in an *en banc* court of appeals decision upholding the annexation. The Court in *City of Richmond* refused to give the earlier decision "estoppel effect" in view of the "nonparticipation of the United States and the Attorney General" in that litigation (*id.* at 374 n.6). See also *Hathorn v. Lovorn*, 457 U.S. 255, 269 n.23 (1982) (Attorney General "is not bound by the resolution of [Section] 5 issues in cases to which [she] was not a party").

Furthermore, the single-judge court in the *Howard* litigation was not "a court of competent jurisdiction," as required by *Montana* and *Southern Pacific*, *supra*, for purposes of determining whether the City of Monroe's implementation of a majority vote requirement had been precleared in accordance with Section 5. As this Court has held, "disputes involving the coverage of [Section] 5 [must] be determined by a district court of *three* judges." *Allen*, 393 U.S. at 563 (emphasis added). Thus, the originating judge in *Howard* had jurisdiction only to interpret the meaning of the statewide majority vote provision and its applicability to the City of Monroe. He had no jurisdiction to decide what effect the preclearance of that provision had on the Section 5 status of the City's adoption of a majority vote requirement.

Moreover, it is not at all clear that the originating judge *intended* to decide the preclearance issue now before this Court. He simply stated that the statewide provision (1) "was approved by the Attorney General," (2) "clearly applies here," and (3) "requires election by majority vote" (J.S. App. 50a). He did *not* "directly determine[]" (as also required by *Montana* and *Southern Pacific*) whether the Attorney General's approval of the statewide provision constituted

approval of all voting changes brought about as a result of its application to individual municipalities.

Nor was any such "direct determination" made by the three-judge court in *Howard*, either before remanding the case to the originating judge or—as might have been expected—after his decision on remand. Once the single-judge court determined that Georgia's statewide provision required the City of Monroe to conduct majority vote elections, it was the province of the three-judge court to determine whether the City's adoption and implementation of that requirement had been submitted and precleared in accordance with Section 5. Although both courts mentioned that the statewide provision had been precleared, neither court "directly determined" whether the City's change from plurality voting to majority voting was subject to any further preclearance requirement. The fact that this final step was never taken in *Howard* is further reason why that case has no preclusive effect here.

Finally, at the time *Howard* was decided, the district court did not have the benefit of this Court's decisions in *City of Rome* and other cases discussed below in which this Court has clarified the proper scope and interpretation of Section 5. This Court has indicated that it may be inappropriate to apply preclusion principles when there has been such an intervening change in the law. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945) ("*res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation"); *Whitcomb v. Chavis*, 403 U.S. 124, 162-163 (1971) (opinion of White, J.) (rejecting argument that statutory plan approved by district court in 1965 was "beyond attack" in light of fact that

"disparities * * * thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive"). Under all of the circumstances presented here, the three-judge court properly refused to give preclusive effect to the 1976 decision in *Howard*, and properly assessed the effect of the Attorney General's preclearance of the statewide majority vote provision on the City of Monroe's local implementation of a majority vote requirement in light of this Court's intervening decision in *City of Rome*.

B. Preclearance Of The City Of Monroe's Annexation Ordinances Did Not Constitute Preclearance Of The City's Adoption Of A Majority Vote Requirement

The three-judge court also correctly held that Section 5 preclearance of the annexation ordinances the City of Monroe submitted for review in 1976 did not constitute preclearance of the City's prior adoption and continued implementation of a majority vote requirement (see J.S. App. 22a-29a). The City argues (J.S. 6-11) that the Attorney General should be deemed to have precleared its change to majority vote elections because (1) he had actual notice of the change by virtue of both the 1976 submission of the annexations, and communications from the *Howard* plaintiffs' counsel regarding possible intervention by the United States for the purpose of appealing the originating judge's decision to this Court; and (2) after conducting an "extensive evaluation" of the City's use of majority voting, the Attorney General neither intervened in *Howard*, nor "elected * * * to interpose [a Section 5] objection" (J.S. 11) to the City's adoption of a majority vote requirement, nor requested that the City submit that change for Section 5 preclearance.

The three-judge court properly rejected those arguments, ruling that the change to majority voting in mayoral elections was not precleared as a result of any action or inaction of the Attorney General in connection with either the *Howard* litigation or the City's Section 5 submission of the annexations. As discussed above, this Court's precedents make clear that the Attorney General will not be deemed to have precleared a voting change unless it has been affirmatively and unambiguously submitted for Section 5 preclearance. See, e.g., *City of Rome*, 446 U.S. at 169 n.6; *Allen*, 393 U.S. at 571; *Sheffield*, 435 U.S. at 136-138. Even when the Attorney General has actual notice that an unprecleared change is being implemented, preclearance of a different (and perhaps related) change does not render valid the unsubmitted change. See, e.g., *Clark v. Roemer*, 500 U.S. 646, 657-659 (1991) (rejecting the argument that preclearance of an amended statute necessarily effects a preclearance of all unprecleared changes incorporated in that statute). A covered jurisdiction must *specifically and explicitly* submit a voting change in order for it to be reviewed and precleared by the Attorney General. See *Allen*, 393 U.S. at 571 (Section 5 does not "contemplate[] that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner").⁸

⁸ Indeed, as the three-judge court noted here (J.S. App. 27a-28a), the requirement of a formal submission, and the policy considerations underlying that requirement, preclude adoption of the City's proposed "preclearance by estoppel" rule, which "would encourage jurisdictions aware of existing, unprecleared changes not to submit those changes for immediate preclearance" (*id.* at 28a). The court found "no tension" (*ibid.*) between its rejection of that proposal and this Court's decision in *Morris v. Gressette*, 432 U.S. 491 (1977), on which

Moreover, as this Court held in *McCain v. Lybrand*, 465 U.S. 236 (1984), preclearance of submitted voting changes is premised on the Attorney General's having *actually considered and approved* the merits of the change in question—that is, determined that the change *did not have a discriminatory purpose or effect*. See *id.* at 252-255. The three-judge court here correctly determined that, although the Attorney General's assessment of the City's 1976 submission concerning annexations may have been "conducted on the basis of the then-current electoral practices, including majority voting, the analysis conducted by the Attorney General to determine whether the annexations had a discriminatory purpose or effect is very different from an analysis comparing plurality versus majority voting" (J.S. App. 24a). The court explicitly found that "nothing in [the record] shows that the Attorney General made the difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect" (*id.* at 23a-24a). Nor was the Attorney General asked to address any such change in the submission of the annexations. Thus, preclearance of the annexations

the City relies (J.S. 12-13), since implementation of the unprecared provision in that case resulted from the Attorney General's failure to interpose a *timely* objection to a *formal* Section 5 submission. This Court has never held that the Attorney General's failure to act upon an *unsubmitted* change constitutes preclearance of that change. See *Sheffield*, 435 U.S. at 136 (observing that, while the Attorney General's failure to act on submitted voting changes might constitute preclearance of those practices, "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). See also our discussion of "equitable preclearance" at pages 26-28, *infra*.

cannot be deemed also to have precleared the City's unsubmitted adoption of a majority vote requirement.

The City argues that *McCain* requires only "actual knowledge" and some analysis of an unprecared change (J.S. 10), and suggests that the Court would have found "tacit preclearance" in *McCain* if there had been any evidence that the Attorney General remained silent in the face of such information (J.S. 10-11). The language quoted by the City in support of this contention, however, suggests only that this Court was unwilling to assume tacit approval of unsubmitted changes to which the Attorney General's preclearance letter made no reference, it being "unlikely that [the Attorney General] would have kept his consideration and approval of the changes * * * a secret" if he had been aware of these changes and had in fact considered and approved them. See *McCain*, 465 U.S. at 254.

The City also attempts to distinguish this case from *McCain* on the basis that a "focal point" of the Section 5 review of the annexations submitted here was "the effect the annexations would have in the context of the City's use of majority vote" (J.S. 9). However, there is no evidence that the Attorney General ever considered (much less determined) the effect of *the change from plurality to majority voting* independently—that is, *outside of the context of the proposed annexations* actually submitted for review; nor is there any evidence that the Attorney General ever considered whether that change may have been motivated by a discriminatory purpose. In the absence of any such evidence, it would be no more legitimate for this Court to infer tacit approval of the unsubmitted practice here than it was to infer such approval in *McCain*. Indeed, it cannot fairly be said that the Attorney General "elected not to interpose

an objection" to the City's use of majority voting (J.S. 11), as he had no authority to interpose such an objection without an actual submission.

The City criticizes the Attorney General's failure to request a submission in 1976, once he was made aware, during preclearance of the annexations, that the City's majority vote requirement had never been submitted and precleared (J.S. 14). It may well be that the United States *should* have requested that the City's unprecleared change to majority voting be submitted, either during the preclearance review of the annexations, or as an independent matter, when it learned that the City was implementing this covered change without preclearance. See 28 C.F.R. 51.15(b) (1971) (the Attorney General, upon learning of an unprecleared voting change, "shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement").⁹ Whatever the reason for the Attorney General's decision *not* to request a submission at that time,¹⁰ one thing is clear—the majority vote requirement *was*

⁹ Although the City characterizes this regulation as "mandatory" (J.S. 14), this Court has expressed a great "reluctan[ce] to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action" or otherwise deprives the agency of the authority to act, especially when "important public rights are at stake" and the controlling statute or regulation "nowhere specifies the consequences" of any such failure. See *Brock v. Pierce County*, 476 U.S. 253, 259-260 (1986).

¹⁰ The record in this case reflects that a letter requesting submission of the unprecleared change was in fact prepared by a Justice Department attorney, but—for reasons that cannot now be determined—was never sent to the City (see J.S. App. 10a).

never submitted. This Court's precedents make clear that the responsibility of submitting proposed voting changes falls to the covered jurisdiction. See, e.g., *McCain, supra*. That responsibility never was fulfilled in this case; thus, as nothing short of an "unambiguous" submission can properly result in preclearance, it follows that an unsubmitted change cannot be "tacitly" precleared by the Attorney General's failure to request a submission.

Accordingly, the three-judge court correctly held that preclearance of the annexations submitted by the City of Monroe in 1976 did not also preclear the City's unsubmitted change to majority voting.

II. THE ATTORNEY GENERAL'S SUIT IS NOT BARRED BY LACHES

The three-judge court likewise properly concluded that the Attorney General is not legally or equitably barred from pursuing a Section 5 remedy in court by virtue of having failed either to request a Section 5 submission, or to file a Section 5 action seeking to enjoin implementation of the unprecleared change, upon learning of a covered voting change that has not been submitted for Section 5 review (see J.S. App. 29a-35a). This is a logical corollary to the requirement of a formal submission for preclearance previously discussed. As this Court stated in *Clark*, 500 U.S. at 658-659, Congress put the burden of submitting voting changes for preclearance on covered jurisdictions because it recognized that the Attorney General's many duties and responsibilities, and the Department of Justice's "limited resources," make it impossible for them to "monitor and identify each voting change in each jurisdiction" subject to Section 5, and to "investigate independently all changes with respect to voting enacted by States and subdivisions covered

by the Act." Likewise, the Department does not have the resources to participate in every Section 5 lawsuit brought by private litigants, or to prosecute independently every violation of the law. Thus, no legal consequence can fairly be attributed to the Attorney General's failure to address an unsubmitted voting change, to file a Section 5 lawsuit against a covered jurisdiction, or to participate in a private lawsuit under Section 5.

Moreover, since the Attorney General has neither the obligation nor, indeed, the authority to preclear a voting change in the absence of a Section 5 submission, the United States cannot be precluded from challenging an unsubmitted voting change, notwithstanding any earlier failure to respond to information that a covered change has not been submitted for preclearance. Because the passage of time does not in any way negate the Attorney General's duty to "protect[] a public interest of the highest significance—the right of all citizens to participate equally in the processes of democratic governance" (J.S. App. 32a)—the three-judge court correctly held that "the instant case falls well within the core of cases in which the United States is immune from the doctrine of laches" (*id.* at 33a). See, e.g., *United States v. Beebe*, 127 U.S. 338, 344 (1888) (United States cannot be barred by laches in a suit brought "as a sovereign Government to enforce a public right, or to assert a public interest"), citing *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886), and cases cited therein;¹¹

¹¹ The City relies on *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), for the contrary proposition (see J.S. 12-13). However, as the three-judge court here explained (see J.S. App. 30a-32a), reliance on laches as grounds for dismissal of an EEOC action, explicitly limited in *Occidental Life*

Guaranty Trust Co. v. United States, 304 U.S. 126, 132-133 (1938); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986); *United States v. Louisiana*, 952 F. Supp. 1151, 1176 (W.D. La.) (three-judge court), *aff'd mem.*, 117 S. Ct. 2476 (1997).¹²

Application of the doctrine of laches to the United States seems particularly inappropriate in the context of a Section 5 suit. As this Court has recognized, Congress's very purpose in enacting Section 5 was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Permitting a covered State or locality that has failed to comply with Section 5's preclearance requirements to invoke the doctrine of laches in a suit brought by the Attorney General to vindicate the public interest would thus frustrate Section 5's central objective. Cf. *Brooks v. State Board of Elections*, 775 F. Supp. 1470, 1481-1482 (S.D. Ga. 1989) (three-judge court) (rejecting the argument that laches may require it to "equitably preclear" a voting change, on the ground

to situations where a defendant can show actual prejudice as a result of the EEOC's inordinate delay (see 432 U.S. at 373), has been further limited by the lower courts to suits in which the government is functioning not in its sovereign capacity, but rather as a nominal party seeking relief on behalf of a private complainant.

¹² Having so ruled, the three-judge court found no need to address the argument that "the lack of preclearance could be seen as a 'continuing violation' [of Section 5] and thus saved from a laches bar" (J.S. App. 30a-31a n.18)—an argument which could provide an alternative basis for affirming the decision below. See, e.g., *Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981) (three-judge court) (Section 5 is violated each time municipal elections are conducted using unprecleared voting changes; thus, "the vice of * * * past non-compliance survives unabated as a present violation").

that it "would do violence to the heart of section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding section 5 for a long time"), *aff'd mem.*, 498 U.S. 916 (1990).

III. NO QUESTION IS PRESENTED IN THIS APPEAL CONCERNING THE ATTORNEY GENERAL'S AUTHORITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Contrary to the City's assertion (see J.S. 2, 15-16), this appeal does *not* present any issue concerning the Attorney General's authority under Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The sole issue before the three-judge court on the parties' cross-motions for summary judgment was whether the City's adoption and implementation of a majority vote requirement in its mayoral elections had been precleared as required by Section 5. Any negotiations the Department of Justice may have had with the City concerning the application of Section 2 to other voting practices were totally irrelevant to the issue before the three-judge court on these motions, and the City's discussion of these negotiations (see J.S. 4-5) is likewise totally irrelevant to the issue presented in this appeal.

The City's suggestion (J.S. 16) that the Attorney General has abused her Section 5 authority to obtain a Section 2 remedy in this case is simply unfounded. The proceedings below were entirely consistent with this Court's decisions limiting the issues for determination by the local three-judge court in a Section 5 suit brought by the Attorney General or by a private litigant to (1) whether the state or local practice being challenged is a change covered by Section 5; (2) if so, whether the State or locality has complied with

Section 5's preclearance requirements; and (3) if there has been no such compliance, the appropriate relief to be afforded to the plaintiffs. See, *e.g.*, *Perkins v. Matthews*, 400 U.S. 379, 383, 396-397 (1971); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977) (*per curiam*); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). After determining that the City of Monroe's adoption of a majority vote requirement was a covered change that had *not* been precleared in accordance with Section 5, the three-judge court correctly determined that injunctive relief prohibiting the City from implementing the unprecleared change is an appropriate Section 5 remedy (J.S. App. 35a-37a). See *Clark*, 500 U.S. at 652-653; *Lopez v. Monterey County*, 117 S. Ct. 340, 347 (1996) (error for the district court to refuse to enjoin an unprecleared county judicial election plan, even though the injunction would leave the county without a plan).

There is no basis whatsoever for reading the decision below as allowing the Attorney General to "achieve a Section 2 remedy" in the absence of any evidence or findings of intentional discrimination against minority voters. The local three-judge court determined only that the City's majority vote requirement for mayoral elections had not in fact been precleared by the Attorney General; the court did *not* determine whether there was any legitimate basis for the Attorney General's refusal to preclear this change. Indeed, this district court had no jurisdiction to make any decision on the merits as to whether the covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color. That determination is expressly reserved under Section 5 for consideration either by the Attorney General or by the United

States District Court for the District of Columbia. See *Perkins*, 400 U.S. at 385; *Warren County*, 429 U.S. at 645; *City of Lockhart*, 460 U.S. at 129 n.3.

Thus, to the extent that the City may be complaining that the Attorney General improperly applied Section 2 standards in refusing to preclear majority vote elections for mayor when that covered change was finally submitted for Section 5 review in 1990, the complaint has been addressed to the wrong forum. Such a contention is properly made in a request for administrative review under Section 5 to the Attorney General or in a Section 5 declaratory judgment suit seeking preclearance of a covered change by a three-judge court in the District of Columbia, not in a Section 5 enforcement action before a local three-judge court seeking to enjoin the use of an unprecleared change. Nothing in the decision on appeal here, or in the proceedings leading to that decision, in any way precludes the City of Monroe from taking such action.¹³ If the City is successful in that action, the injunction challenged here will have no further effect on its ability to implement majority voting in its mayoral elections.

¹³ In fact, the City on August 1, 1997, requested that the Attorney General reconsider her objection to Monroe's majority vote requirement in mayoral elections. That request is currently under consideration.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1997

Per Curiam

SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA**

No. 97-122. Decided November 17, 1997

PER CURIAM.

The United States claims the city of Monroe, Georgia did not seek preclearance for majority voting in mayoral elections, as required by §5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. §1973c. The Government seeks to enjoin majority voting and to require Monroe to return to the plurality system it had once used. A three-judge District Court for the Middle District of Georgia agreed with the Government and granted summary judgment. 962 F. Supp. 1501 (1997). The District Court rejected Monroe's claim that the Attorney General's preclearance of a 1968 statewide law encompassed Monroe's adoption of a majority system. On Monroe's motion, this Court stayed enforcement of the judgment. 521 U. S. ____ (1997). The case is now on appeal, and the judgment must be reversed.

I

The parties agree upon the facts. Until 1966, Monroe's city charter did not specify whether a candidate needed a plurality or a majority vote to win a mayoral election. In practice, the city used plurality voting in its elections until 1966 and majority voting thereafter.

In 1966, the General Assembly of Georgia amended the city's charter to require majority voting in mayoral elections. 1966 Ga. Laws 2459. Because Monroe is a jurisdiction covered by §5 of the Voting Rights Act, the change had to be precleared. Georgia or Monroe could have

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sought preclearance by submitting the change to the Attorney General or seeking a declaratory judgment from the United States District Court for the District of Columbia. Neither did, so the 1966 charter amendment was not precleared.

In 1968, the General Assembly passed a comprehensive Municipal Election Code (the 1968 code), which is still in force today. The statute applies to Monroe and all other municipalities in Georgia. Section 34A-1407(a) of the 1968 code has two sentences. The first sentence sets forth a rule of deference to municipal charters:

"If the municipal charter . . . provides that a candidate may be nominated or elected by a plurality . . . , such provision shall prevail."

The second sentence lays down a state-law default rule for all other cities:

"Otherwise, no candidate shall be . . . elected . . . [without] a majority of the votes cast" Georgia Municipal Election Code, §34A-1407(a) (1968 code section or §34A-1407(a)), 1968 Ga. Laws 977, as amended, Ga. Code Ann. §21-3-407(a) (1993).

Georgia submitted the 1968 code to the Attorney General for preclearance. Its cover letter stated: "In view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the Municipal Election Code." 962 F. Supp., at 1505. The letter then listed the majority-vote provision as a significant change, noting: "Whether the majority or plurality rule is in effect in the municipal election will depend upon how the municipality's charter is written at present or may be written in [the] future" *Ibid.* The Attorney General objected to other provisions of the 1968 code but did not object to §34A-1407(a), so it was, and is, precleared. The United States does not dispute this conclusion, nor does it claim Georgia's submission was mislead-

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ing, ambiguous, or otherwise defective.

In 1971, the General Assembly passed a comprehensive revision of Monroe's charter. 1971 Ga. Laws 3227. The 1971 charter made explicit provision for majority voting. Neither Georgia nor Monroe sought to preclear the revisions to the charter.

In 1990, the General Assembly once again amended Monroe's charter and carried forward the majority-vote requirement. This time, Monroe sent the 1990 charter to the Attorney General for preclearance, but the cover letter did not mention the majority-vote provision. The Attorney General objected to it nevertheless, interpreting the submission as effecting a change from plurality to majority voting. The Government filed suit against Monroe and city officials in 1994 and prevailed in the District Court.

II

The 1968 code must be the centerpiece of this case, for it defers where city charters are specific and provides a default rule where they are not. If a city charter requires plurality voting, the deference rule in the first sentence of the 1968 code section allows the municipal charter provision to take effect. Monroe, however, does not have and has not had a plurality-vote provision in its charter. The first sentence simply does not apply here because no charter provision triggers its rule of deference to municipal law. Thus, the second sentence's default rule of state law governs, requiring Monroe to use majority voting. Since the Attorney General precleared the default rule, Monroe may implement it.

The District Court reached a contrary conclusion, relying on a single footnote in *City of Rome v. United States*, 446 U. S. 156, 169-170, n. 6 (1980). As the District Court put it: "The [*Rome*] Court's rationale focused squarely on the notion that [Georgia's] submission of the 1968 State-wide Code did not put before the Attorney General the

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propriety of changes in the voting practices in individual cities." 962 F. Supp., at 1513.

The court's reliance on the footnote was misplaced. Unlike this case, which concerns the default rule in the second sentence of the 1968 code section, the *City of Rome* footnote concerned the deference rule in the first sentence. Rome's pre-1966 charter had an explicit requirement of plurality voting. When the General Assembly amended Rome's charter to provide for majority voting, no one sought to preclear this or other changes. "Rome [later] argue[d] that the Attorney General, in preclearing the 1968 Code, [had] thereby approved by reference the City's 1966 Charter amendments." *City of Rome v. United States*, 472 F. Supp. 221, 233 (DC 1979), aff'd, 446 U. S. 156 (1980); see also 472 F. Supp., at 233 ("Rome argues that its Charter, having been amended in 1966 to provide for majority voting, did not provide for plurality voting in 1968, and that therefore the 1968 Code mandated majority voting").

This Court rejected Rome's claim because the submission of the 1968 code did not submit Rome's 1966 charter for preclearance "in an unambiguous and recordable manner." 446 U. S., at 170, n. 6 (internal quotation marks omitted). Georgia's submission of the 1968 code "informed the Attorney General only of [Georgia's] decision to defer to local charters and ordinances regarding majority voting" should a city choose to include a voting provision in its charter as permitted by the deference rule. *Ibid.* (internal quotation marks omitted; emphasis added). Georgia's submission of the 1968 code did not give the Attorney General "an adequate opportunity to determine the purpose of [Rome's 1966] electoral changes and whether they will adversely affect minority voting." *Id.*, at 169, n. 6.

Indeed, Georgia's submission of the 1968 code did not even arguably constitute a request for preclearance of the 1966 change to Rome's charter. Given that the unpre-

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cleared charter amendment was a nullity as a matter of federal law, the 1968 code did not change the law in Rome. Rather, it deferred to the plurality-vote requirement in the pre-1966 charter. In this case, however, the 1968 code is what changed the law in Monroe. Accordingly, unless the Attorney General's preclearance of the code was a nullity, there has been no violation of the Voting Rights Act.

In short, *City of Rome* rejected Rome's effort to use the submission of the 1968 code to validate the 1966 municipal electoral changes. *City of Rome*, in discussing the "decision to defer to local charters," recognized that the case arose under the rule of deference to municipal law. This rule of deference would not have been interpreted to effect a change in the law, and so it did not put the Attorney General on notice of Rome's shift to majority voting. Because municipal law was dispositive under the first sentence of the 1968 code section, *City of Rome* said nothing about the state-law default rule of majority voting in the second sentence.

The instant case, in contrast, is controlled by the default rule of state law set forth in the second sentence. Monroe's pre-1966 charter, unlike Rome's, did not require plurality voting and so could not trigger the rule of deference to municipal law in the first sentence. Thus Monroe, unlike Rome, does not need to breathe life into its invalid 1966 charter to circumvent the rule of deference. After one disregards Monroe's invalid 1966 and 1971 charters, the state-law default rule mandates majority voting.

Cases, such as this one, arising under the default rule satisfy all of the preclearance requirements in *City of Rome*. The Government does not dispute that Georgia submitted the state-law default rule to the Attorney General in an "unambiguous and recordable manner." The submission, furthermore, gave the Attorney General "an adequate opportunity to determine the purpose of the [default-rule] electoral changes and whether they will ad-

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versely affect minority voting." In consequence, by pre-clearing the 1968 code the Attorney General approved the state-law default rule. The controlling default rule having been precleared, Monroe may conduct elections under its auspices.

Because the 1968 code disposes of the case on this undisputed factual record, the Court need not address appellants' other contentions. The judgment of the District Court is

Reversed.

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. v. UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA

No. 97-122. Decided November 17, 1997

JUSTICE SCALIA, concurring in the judgment.

Although I agree with the result reached by the Court, my reasoning is somewhat different. Like JUSTICE BREYER, I believe that without knowledge of the contents of city charters the Attorney General could no more have known the precise practical effect of the second sentence of the Georgia statute than he could have known the precise practical effect of the first, see *post*, at 4. But there is, nonetheless, a critical difference between the two sentences. As far as appears, the first sentence (giving effect to plurality voting provisions contained in municipal charters) does not effect any change in voting. To think it did, one would have to suppose that prior to the statute various municipalities were ignoring their charters, which is most unlikely. So the first sentence did not inform the Attorney General "in some unambiguous and recordable manner" that a change was afoot, see *City of Rome v. United States*, 446 U. S. 156, 169, n. 6 (1980) (internal quotation marks omitted).

The second sentence, however, sets forth a default rule of majority voting for all municipalities that have not treated the matter in their charters. To think that this effects a change, one need only believe that some municipalities have no charter provision on point, and that a subset of those have adopted a practice of plurality voting. Such a belief is not only reasonable; it is virtually essential unless one is to consider the statute pointless. As to

SCALIA, J., concurring

the second sentence, therefore, the Attorney General ought to have known that he was approving a switch to majority voting in some municipalities. If that seemed to him possibly troublesome, I think the burden was upon him to inquire further, and not upon the state, every time it enacts a state-wide statute affecting voting, to submit a city-by-city breakdown of the consequences. *City of Rome* need not and should not be extended that far.

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA**

No. 97-122. Decided November 17, 1997

JUSTICE SOUTER, dissenting, with whom JUSTICE BREYER joins.

In 1968 the Georgia legislature enacted a Municipal Election Code with the following provisions governing the alternatives of plurality and majority voting:

"If the municipal charter . . . provides that a candidate may be nominated or elected by a plurality of the votes cast . . ., such provision shall prevail. Otherwise, no candidate shall be . . . elected to public office in any election unless such candidate shall have received a majority of the votes cast . . ." Georgia Municipal Election Code, §34A-1407(a), 1968 Ga. Laws 977, as amended, Ga. Code Ann. §21-3-407(a) (1993).

These provisions were applicable in ways that would result in no changes in election practices in communities whose charters (so far as otherwise enforceable) provided that a plurality would suffice, whose charters provided that a majority was required, or whose charters were silent but whose practices had been to require a majority. The first sentence quoted from the Code (deferring to plurality provisions) would confirm the practice in the first class of municipalities, while the second sentence (a default provision requiring a majority in all other cases) would confirm the practices in the second and third classes. The new Code would, however, require a change in the practice in any community whose municipal charter (so far as otherwise enforceable) was silent on the plural-

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ity-majority issue, but in which the practice had been to accept a plurality as sufficient.

The 1968 Code was submitted to the Attorney General of the United States for preclearance under §5 of the Voting Rights Act, 42 U. S. C. §1973c, (since the entire State of Georgia was, and remains, subject to §5), and the Attorney General approved the provisions in question. In two instances we have been presented with a question whether application of the default provision to effect a change in practice to majority voting was precleared by virtue of the blanket preclearance of the default provision. In the first case, *City of Rome v. United States*, 446 U. S. 156 (1980), we answered no; in the second case, this one, the answer should be the same.

In Rome's case, the charter provision that was valid and enforceable when the 1968 Code was precleared provided expressly for plurality voting. Therefore, the Code's deference provision applied and the plurality rule remained the rule under the Code. Rome argued, however, that the default provision should be applied so as effectively to validate an unprecleared 1966 municipal charter change to an express majority requirement. This Court rejected the argument in these words:

"We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR §51.10 (1979), and the decisions of this Court require that the jurisdiction 'in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his considera-

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tion pursuant to the Act,' *Allen v. State Board of Elections*, 393 U. S. 544, 571 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 137-138 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only of 'its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts,' and 'did not . . . submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues.' 472 F. Supp. 221, 233 (DC 1979)." 446 U. S., at 169-170, n. 6.

Since the Attorney General had never been shown Rome's 1966 municipal charter change (much less precleared it), he had never had an "adequate opportunity" to determine the purpose and effect of the proposed "electoral chang[e]" from plurality to majority, not in 1966 (because preclearance had not been sought) and not in 1968 (because he was not apprised of the purported 1966 change necessary to produce a majority vote requirement under the 1968 Code).

Monroe now claims the benefit of the 1968 Code's default provision, in circumstances just like Rome's, with one distinction. Monroe, too, obtained a 1966 charter change purporting to enact a majority requirement, for which Monroe, too, failed to seek preclearance. But Monroe could arguably enforce a majority requirement even if the 1966 unprecleared charter amendment were ignored, sim-

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ply by applying the Code's default provision to the circumstances that preceded the unprecleared 1966 amendment: before that amendment, although Monroe's charter was silent on the plurality-majority issue, the municipal practice (perfectly valid for purposes of §5) was to accept a plurality as sufficient. Thus, the unprecleared 1966 charter change could be ignored in Monroe's case (as it was in Rome's) and the default provision of the 1968 Code would make Monroe a majority vote municipality.

As a predicate for applying the 1968 Code to effect majority voting requirements, however, this distinction between Rome's unprecleared 1966 change and Monroe's valid pre-1966 silent charter is not entitled to make any difference. The object of the preclearance requirement is, at a minimum, to apprise the Attorney General of any change in voting practice. Section 5 requires preclearance not only in the case of a change of a voting "standard" that was not in place when the Voting Rights Act took effect, but also of a change in a "practice" or "procedure." 42 U. S. C. §1973c. The point of the preclearance procedure is to determine whether the change proposed reflects either a "purpose" or will have the "effect" of forbidden abridgment of voting rights. *Ibid.* A new practice and a new effect could result not only from applying the Code's default provision to an invalid (because unprecleared) charter revision, but also from applying it to a perfectly valid charter provision and practice. In either case, on the sensible reasoning of *City of Rome*, there can be no preclearance of a new practice unless the Attorney General is unambiguously put on notice of it. See 446 U.S., at 169-170, n. 6. Thus, Monroe is in no different position from Rome. Neither Rome nor the State ever disclosed the 1966 charter change on which the default provision might operate to provide a new majority vote requirement; neither Monroe nor the State ever disclosed the pre-1966 charter silence on which the default provision might operate to

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provide a new majority vote requirement. Alternative analyses, leading to the conclusion that the Attorney General's preclearance of the relevant section of the 1968 Code also precleared its undisclosed effects, are not only at odds with the unambiguous language of §5 of the Voting Rights Act, but imply that the Attorney General was quite the cavalier when he approved the default provision in 1968. Since no particular charter provisions were submitted to him along with the 1968 Code, *City of Rome*, *supra*, he was not on notice of any particular effect that might result from application of the default provision. It is therefore unreasonable to suppose that his approval of the Code was meant to preclear its undisclosed applications even as to otherwise valid charter provisions and municipal practices.*

* My analysis entails a modest but nonetheless discernable scope for the Attorney General's preclearance of the 1968 deferral and default provisions. The preclearance may have left the provisions enforceable insofar as they would result in ratification of prior, valid municipal practices (assuming that preclearance was necessary as to such applications); in any case, the preclearance amounted to findings that the default provision did not as such represent an intent to affect minority voting adversely, and that some applications of the provision would presumably be possible without adverse effects.

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SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA**

No. 97-122. Decided November 17, 1997

JUSTICE BREYER, with whom JUSTICE SOUTER joins,
dissenting.

City of Rome v. United States, 446 U. S. 156 (1980), focused upon a change in Rome, Georgia's, method of electing city officials—a change from “first-past-the-post” (plurality wins) to “run-off” (majority needed to win). The change took place in 1966. The change was of a kind that could have made it more difficult for newly enfranchised black voters to elect a mayor (*e.g.*, where the black population of a town amounted, say, to 35% of all voters). The change had not been precleared, though §5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. §1973c, required preclearance. In 1968, however, Georgia had precleared a different change in its law. Georgia had submitted, and the Attorney General had precleared, a comprehensive Municipal Election Code that provided, in relevant part:

“If the municipal charter . . . provides that a candidate may be nominated or elected by a plurality of the votes cast . . . , such provision shall prevail. Otherwise, no candidate shall be . . . elected to public office in any election unless such candidate shall have received a majority of the votes cast” Georgia Municipal Election Code, §34A-1407(a), 1968 Ga. Laws 977, as amended, Ga. Code Ann. §21-3-407(a) (1993).

Rome argued that the Attorney General's preclearance of this 1968 change in effect precleared the plurality-to-

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majority change that Rome had made two years earlier. The Court rejected Rome's argument.

The case before us now involves another Georgia city, the city of Monroe. Monroe, like Rome, made a change in its system for electing city officials—a change from “first-past-the-post” (plurality wins) to “run-off” (majority needed to win). Monroe, like Rome, made the change in 1966. And, Monroe's change, like Rome's change, was not precleared. Monroe, like Rome, argues that the Attorney General's preclearance of Georgia's 1968 change in effect precleared its change to a majority system. Monroe acknowledges that this Court, in *City of Rome, supra*, rejected Rome's similar claim. But it asks us to note probable jurisdiction in part to “address the impact of the Attorney General's preclearance of the 1968 Municipal Elections Code as it relates to the majority vote requirement.” Juris. Statement 17. In my view, the circumstances here are virtually identical to those at issue in *City of Rome*, and this Court's rejection of Rome's argument there requires us to reject Monroe's similar argument here.

I rest this conclusion upon what the parties argued before the Court in *City of Rome* and what the Court wrote. Rome, like Monroe, claimed that, in preclearing the 1968 statewide statute, the Attorney General had precleared its local majority system. The reply, by the United States, in *City of Rome*, included the following argument:

“In its 1968 submission, the State did not ‘submit’ the changes as they applied to the City of Rome. There was no explanation of how, or even whether, the City's procedures were changed. In order to ‘submit’ a new procedure, the change must be clearly explained to the Attorney General, 28 C. F. R. 51.10; he cannot reasonably be held to be put on notice of the election procedures for every municipality when an act with statewide effect is submitted. As this Court [has]

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held, preclearance cannot occur until the particular change has been submitted to the Attorney General and he has been afforded an opportunity to assess its purpose and its effect on minority voting in *that* jurisdiction.” Brief for Appellees in *City of Rome v. United States*, O. T. 1979, No. 78–1840, pp. 69–70 (citation omitted).

This Court, accepting the argument of the United States, wrote:

“Both the relevant regulation, 28 CFR §51.10 (1979), and the decisions of this Court require that the jurisdiction ‘in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act,’ and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction. Under this standard, the State's 1968 [preclearance] submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only of ‘its decision to defer to local charters and ordinances regarding majority voting. . . .’ and ‘did not . . . submit in an ‘unambiguous and recordable manner’ all municipal charter provisions, as written in 1968 or as amended thereafter, regarding th[is] issu[e].’” *City of Rome v. United States, supra*, at 169–170, n. 6 (citations omitted).

It seems to me that this statement disposes of the case before us. The statement points out that Georgia's 1968 submission did not describe the effect of its 1968 changes, town by town, in each of Georgia's more than 500 towns and cities. The statement specifically says that Georgia's

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simple "submission" of its 1968 comprehensive municipal code did not preclear Rome's "1966 electoral change" because Georgia did not also "submit" the relevant "municipal charter provisions, as written in 1968 or as amended thereafter." Georgia did not submit Monroe's charter to the Attorney General in 1968 any more than it submitted Rome's; nor is there any reason to believe that the Attorney General knew the details of Monroe's circumstances any more than he knew the details of Rome's. Hence, as the District Court concluded in this case, the 1968 preclearance did not preclear Monroe's earlier 1966 change. *City of Rome, supra*.

The majority's decision to the contrary rests upon one factual difference between Rome and Monroe. The difference consists of the fact that Rome's original pre-1966 "first-past-the-post" plurality system was written into Rome's city charter. But Monroe's original pre-1966 "first-past-the-post" plurality system was a matter of practice. Its pre-1966 city charter was silent. This difference means that, had a court set aside the 1966 changes in each city, and were no other change to have taken place, then Rome would have been left with a city charter that prescribed a plurality rule, while Monroe would have been left with a silent city charter and a plurality practice. The precleared 1968 state law, if left free to operate on these different circumstances, would have left Rome with a plurality rule (for its pre-1966 city charter contained that rule), but would have changed Monroe's plurality practice to a majority practice (for its pre-1966 city charter was silent).

This complex difference, in my view, is irrelevant. The Attorney General, in 1968, was no more likely to have known about Monroe's change from "plurality-practice" to "majority-charter" than to have known about Rome's change from "plurality-charter" to "majority-charter." Nor is there any reason to believe the Attorney General, in 1968, would have wanted to approve previously unpre-

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cleared changes of the former, but not of the latter, variety. There is no more reason to believe that the Attorney General, had he known about Monroe's 1966 change, would have approved the application of the 1968 law to Monroe, than to believe that the Attorney General, had he known about Rome's change, would have approved the application of the 1968 law to Rome. Indeed, if Monroe's black population in 1966 was as high as it is today (37% of the electorate), Monroe's change to a majority vote system could have been precisely the sort of discriminatory change at which the Voting Rights Act was directed.

The majority, and Justice Scalia, make a further argument resting upon a distinction between the first and second sentences of the 1968 code that the Attorney General precleared. The majority says, for example, that *City of Rome* "said nothing about the state-law default rule of majority voting in the second sentence," *ante*, at 4-5; and Justice Scalia refers to a "second sentence . . . default rule of majority voting for all municipalities that have not treated the matter in their charters," *ante*, at 1. The majority then finds that the Attorney General precleared the second-sentence default rule as applied to Monroe, apparently because it believes that "[t]he Government does not dispute that Georgia submitted the state-law default rule to the Attorney General in an 'unambiguous and recordable manner,'" *ante*, at 5. Justice Scalia reaches the same conclusion, not because of the Government's position, but because, in his view, the "burden was upon" the Attorney General to seek more information about the "city-by-city" effects of the statute at the time it was submitted. *Ante*, at 2.

A glance at the Georgia statute, *supra*, at 1, will make clear, however, just how finely the majority has had to parse the statute in its effort to escape the binding effect of precedent. That is because *City of Rome* (involving a city with a "majority" charter) and this case *both* concern

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the statute's *second* sentence. See Brief for Appellants in *City of Rome v. United States*, O. T. 1979, No. 78-1840, p. 90; *City of Rome v. United States*, 472 F. Supp. 221, 233 (D. D. C. 1979) ("Rome argues that . . . the 1968 Code mandated majority voting") (emphasis added). And nowhere does either the statute's second sentence or *City of Rome* explicitly make the default/deference distinction that the majority finds critical.

More importantly, there is no reason to think the distinction is critical in respect to the matter here at issue. The Government has not conceded, silently or otherwise, that the Attorney General's preclearance of a statutory "default rule" somehow precleared the application of some such rule to Monroe. To the contrary, the Government's argument, which concerns *all* applications of the "majority" language in the 1968 code's second sentence, is that:

"preclearance of the majority vote provision incorporated in the State of Georgia's 1968 Municipal Election Code did not also preclear the prior or subsequent adoption and implementation of a majority vote requirement by any particular municipality within the State." Motion to Affirm 11.

That argument rather clearly says that the Attorney General, in effect, precleared the Georgia statute on its face, not as applied to each of Georgia's several hundred municipalities. That is the very argument that the Government made, and the Court accepted, in *City of Rome*.

Justice Scalia does not take the majority's view of the Government's argument. Rather, he says that, in any event, the Attorney General's initial preclearance of the second sentence simultaneously precleared that sentence's application because the State's submission was detailed enough to impose upon the Attorney General the "burden" of seeking detailed city-by-city information. *Ante*, at 2. In my view, however, precedent compels a contrary conclu-

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sion. In respect to the relevant point—whether the Attorney General cleared the statute on its face or also as applied—one cannot distinguish the issue before us from the (in this respect) identical issue in *City of Rome*. And that conclusion is consistent with well-established legal principle. See *Clark v. Roemer*, 500 U. S. 646, 656 (1991) ("any ambiguity in the scope of a preclearance request must be resolved against the submitting authority"); *McCain v. Lybrand*, 465 U. S. 236, 257 (1984) (same); 28 CFR §§51.26(d), 51.27(c) (1997) (requiring preclearance submissions to explain changes clearly and in detail).

In a nutshell, *City of Rome* turns on the practical fact that the Attorney General, in preclearing the 1968 Georgia statute, would not have intended to preclear earlier, potentially unlawful, local changes of which he had not specifically been told. Rome was one such city. Monroe was another. The District Court consequently concluded that the Attorney General's preclearance of the 1968 statute did not preclear Monroe's earlier change, any more than it did Rome's. I agree with the District Court and would affirm its judgment.